IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

— *v* —

VINCENT FRANCIS McGEE, JR.

Defendant.

Docket Entries

Date	Proceedings
Feb. 29, 1968	Filed indictment.
Mar. 15, 1968	Pleads Not Guilty—released on own recognizance. 4/9/68 fixed as return date for motions. —WEINFELD, J.
May 28, 1968	Before PALMIERI, J.—Motions 1, Dismiss indictment, 2— Discovery and inspection, 3— Transcript of G.J. Test — Motions argued. Dec. Res.
June 13, 1968	Filed Memo Endorsed on Defts. notice of motion filed 4/11/68 to dismiss. The motion to dismiss the indictment is denied without prejudice to renewal before the trial judge. The motion for discovery is granted to the extent consented to by the Govt. See opinion dated 6/13/68, filed herewith.—PALMIERI, J. (mailed notice)
June 13, 1968	Filed Opinion #34890: Defts. motion to dismiss indictment is denied without prejudice to renew before the trial court. The motion for

discovery is granted only to the extent consented to by the Govt. So ordered. –PALMIERI, J. (mailed notice)

Nov. 8, 1968 – Before MURPHY, J. – Deft. and atty present –Jury Trial begun.

Nov. 12, 1968 – Trial continued.

Nov. 13, 1968 – Trial continued – Jury Verdict – Deft. found guilty on counts 1, 2, 3 & 4 as charged. Pre-sentence report ordered. Sentence set for 1/3/69. Deft. cont'd on own recognizance.

Jan. 16, 1969 – Filed judgment (atty present). It is adjudged that the deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on each of counts 1, 2, 3 & 4 to run concurrently with each other. Deft. continued on his own recognizance pending appeal.–MURPHY, J.

Jan. 16, 1969 – Issued commitment and copies.

Jan. 27, 1969 – Filed affdvt. for an order that deft. may proceed on appeal without being required to prepay fees etc. and endorsed – Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor– MURPHY, J.

Jan. 27, 1969 – Filed Notice of Appeal of the judgment entered in the action on the day of 1/16/69 to the U.S.C.A. (Mailed notice)

Jan. 29, 1969 – Filed notice of appeal from Judgment of 1/16/69 and endorsed leave to appeal in forma pauperis is granted (Mailed notice) –MURPHY, J.

May 7, 1969 – Filed record on appeal has been certified and transmitted to the U.S.C.A. 2nd circuit 5/7/69.

May 18, 1970 – Filed U.S.C.A. order for judgment, the judgment U.S.D.C. for S.D.N.Y. is hereby affirmed. (notice mailed) True copy, Clerk

July 30, 1970– Papers transmitted to the U.S.C.A.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

— *v* —

VINCENT FRANCIS McGEE, JR.

Defendant.

COUNT 1

The Grand Jury charges:

On or about the 29th day of January, 1968, and up to and including the date of the filing of this indictment, in the Southern District of New York, VINCENT FRANCIS McGEE, JR., the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*, and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom an Order to Report For Induction had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to submit to induction into the Armed Forces of the United States.

(Title 50 Appendix, United States Code,
Section 462(a); 32 CFR 1632.14)

COUNT 2

The Grand Jury Further charges:

On or about the 18th day of October, 1967, in the Southern District of New York, VINCENT FRANCIS McGEE, JR., the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*, and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom an Order to Report for a Physical Examination had been mailed by his Selective Service System Local Board, unlawfully and knowingly did fail, neglect and refuse to report for a physical examination at the Armed Forces Examining Station, 39 Whitehall Street, New York City, New York.

(Title 50 Appendix, United States Code, Section 462(a); 32 CFR 1628.16.)

COUNT 3

The Grand Jury charges:

On or about the 20th day of September, 1967, and up to and including the date of the filing of this indictment, in the Southern District of New York, VINCENT FRANCIS McGEE, JR., the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*, and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom a valid notice of classification (SSS Form 110) had been issued showing his current classification, unlawfully and knowingly did fail, neglect and refuse to have in his personal possession at all times, said valid notice of classification (SSS Form 110) which has been issued to him.

(Title 50 Appendix, United States Code,
Section 462(a); 32 CFR 1623.5)

COUNT 4

The Grand Jury charges:

On or about the 3rd day of July, 1967, and up to and including the date of the filing of this indictment, in the Southern District of New York, VINCENT FRANCIS McGEE, JR., the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Training and Service Act of 1967, Title 50 Appendix, United States Code, Section 451 *et seq.*, and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, to whom a current information questionnaire (SSS Form 127) had been mailed by his Selective Service System Local Board requesting information concerning his mailing address, occupational, marital, family, dependency, and military status and physical condition and receipt of a professional degree, unlawfully and knowingly did fail, neglect and refuse to submit such information for which the local board had mailed him a request (SSS Form 127).

(Title 50 Appendix, United States Code,
Section 462(a); 32 CFR 1641.2(b); 32 CFR 1641.7(b))

OPINION OF JUDGE EDMUND L. PALMIERI DENYING MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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68 CR. 186

UNITED STATES OF AMERICA

–against–

VINCENT FRANCIS McGEE, JR.,

Defendant.

APPEARANCES

ROBERT M. MORGENTHAU, Esq.
United States Attorney for the
Southern District of New York
United States Courthouse – Foley Square
New York, N.Y. 10017

JOHN R. ROBINSON, Esq.
Assistant United States Attorney
Of Counsel

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200 Park Avenue
New York, N.Y. 10017
Attorneys for defendant

ROBERT S. CARLSON, Esq.
J. EDWARD MEYER, III, Esq.
Of Counsel

PALMIERI, J.

The defendant moves to dismiss a four count indictment charging him with violations of the Selective Service laws. The defendant has sworn in an affidavit filed in support of this motion that he is a full-time student in good standing at Union Theological Seminary which is "a recognized theological or divinity school," 50 App. U.S.C. § 456(g), and that the Government had full notice of these facts from his grand jury testimony and from various records in possession of his local draft board.

Count 1 of the indictment charges the defendant with refusal to submit to induction into the armed forces of the United States on or about January 29, 1968, in violation of the Military Selective Service Act of 1967 (the "Act") and Section 1632.14 of Volume 32 of the Code of Federal Regulations promulgated by the Selective Service System. Count 2 charges the defendant with refusing to report for a pre-induction physical examination on or about October 18, 1967. Count 3 charges defendant with failing, since September 20, 1967, to have had in his possession a notice of classification, Selective Service Form 110. Count 4 charges defendant with failing to fill out and return an information questionnaire (Selective Service Form 127), all allegedly in violation of various regulations promulgated by the Selective Service System.

The defendant registered with his local draft board at age eighteen, complied with the prescribed Selective Service System procedures, and was afforded a student deferment while he attended college. In July, 1967, defendant's board was notified by the University of Rochester that the defendant had graduated and no longer was in attendance there. Thereupon the board mailed defendant a current information questionnaire. He returned it unopened with a letter stating that he would henceforth return all correspondence from them un-

opened so as to "accept the obligation of patriotic confrontation with a system and program which I feel is beyond the high ideals of the United States and my personal conscientious commitment as a human being and as a Christian."

It appears to be conceded, at least for the purposes of this motion, that on April 15, 1967, the defendant burned his registration card(1) (Selective Service System Form 2), as well as his classification notice (Selective Service System Form 110), and wrote the President (enclosing the remnants) to the effect that despite his student deferment and prospective theological exemption from training and service he was compelled by his religious views to do what he had done "to sever every link with violence." At the time of these events the defendant was on notice, by letter dated March 22, 1966, from his local board that his prior claim that he was a conscientious objector would be considered when he no longer qualified for a student deferment. The defendant never renewed his application for conscientious objector status.

The defendant was reclassified 1-A in September, 1967, and when ordered to report for induction in January, 1968, he appeared and submitted to a physical examination, but refused to submit to induction because of his "moral and religious beliefs."(2) In his affidavit in support of the motion defendant has stated in part the following:

> My refusal to submit to induction on January 29, 1968 (Count 1 of the indictment) was based on the strongest dictates of conscience, and as such, cannot be held to have been a wilful and knowing criminal violation

(1) Such an act can constitute the basis for a criminal charge under 50 App. U.S.C. §462(b)(3). It is not alleged, however, in the indictment presented before the Court.

(2) This quote is taken from an induction center official.

of federal law. My conduct was a legitimate exercise of the First Amendment rights of freedom of religion and free speech against which the Government cannot show a prevailing interest. The action I took posed no threat to the public safety, peace or order. To have submitted to induction in the Armed Forces, on the other hand, would have struck down my deepest religious belief in reverence for life. A submission would have been a denial of the belief itself.

* * *

In the second, third and fourth counts of the indictment, I am charged with failure to report for a pre-induction physical on October 18, 1967, with failure to possess the reclassification notice mailed to me on September 20, 1967 and with failure to answer the Current Information Questionnaire mailed to me on July 3, 1967. Each of these charges should be dismissed for the same constitutional objections which I have raised in connection with Count 1. Each of the above actions and processes of my local draft board, as part of the total effort to compel my induction, violated my First Amendment rights of freedom of religion, speech and conscience and the Fifth Amendment guaranties of due process and equal protection of the laws.

In essence, defendant claims that he was punitively reclassified for protesting against the war in Viet Nam despite his application to be declared a conscientious objector. The defendant raises grave constitutional issues which it is "inexpedient to determine . . . upon a demurrer to a complaint or upon an equivalent motion, if there is a reasonable likelihood that the production of relevant evidence will make the answers to the questions clearer." *Bordens Farm Products v. Baldwin*, 293 U.S. 194, 213 (1934). Rule 12(b)(1) of the Federal Rules

of Criminal Procedure allows only those motions which can be determined without a trial of the general issue. A substantial portion of the defendant's position rests upon facts and inferences from facts which cannot be established except by the thorough and careful factual scrutiny which only a trial can afford. The papers before the Court at this time do not provide a sufficient basis for disposing of the constitutional problems posed by the defendant. Whether or not the defendant must be required to exhaust administrative remedies in this regard and whether his failure to exhaust them precludes him from making certain of the contentions in support of this branch of the motion are matters which can better be left to the *trial* court, in view of what has already been said. The impression is inescapable, however, that the defendant has made a deliberate choice to avoid pursuing his administrative remedies and insists upon a resolution of the issues without full recourse to the administrative processes.

The defendant also claims that whether or not he was punitively reclassified the indictment is insufficient because his 1-A classification is illegal, as he is exempt from military service as a full-time divinity student. 50 App. U.S.C. § 456(g). Defendant argues that this is a statutory exemption which may not be waived any more than one may waive one's sex or infancy. Section 456(g) provides:

> . . . [S]tudents preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theologial or divinity [7] schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title.

The Solicitor General of the United States made the following statement with respect to this exemption in a brief filed before the Supreme Court in the case of *Oestereich v. Selective Service System Local Board No. 11*, F.2d (10th Cir. 1968), *cert. granted* 36 U.S.L.W. 3437 (U.S. May 20, 1968):

> Petitioner is a full-time student in good standing at the Andover Newton Theological School, which is a "recognized theological or divinity school." Thus, he is exempt by the terms of the statute from "training and service" under the Selective Service Act. What Selective Service System Local Board No. 11 has done here is to terminate, by administrative action, the exemption which has been granted by statute. If that action was contrary to the express terms of the Act of Congress granting the exemption, this is obviously relevant in considering the application of the procedural provision on which the government has relied in this case.
>
> * * *
>
> Such a construction is not only possible here, but it is desirable in order to avoid conflict with the congressional determination to grant exemption to ministers and ministerial students. In this situation it may be observed that there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is subject to challenge only on the ground that the board has misapplied or abused its authority in making its judgment. Cf. *Harmon v. Brucker*, 355 U.S. 579, 581-582; *Leedom v. Kyne*, 358 U.S. 184, 188.
>
> * * *
>
> The Solicitor General submits these views for the consideration of the Court. It is his position that, in the light of facts in this particular case, and in the interest of

justice, the judgment below should be reversed, and the cause remanded with directions to hold a hearing as to the presence of the jurisdictional amount required by 28 U.S.C. 1331 and if jurisdiction under that section is found, to enter a decree in favor of petitioner on the basis of his acknowledged status as an exempt ministerial student.

In *Oestereich* the petitioner had been granted an exemption under § 456(g) as a divinity student. Thereafter he was delinquent in respect of performance of his duties under the Act and as a delinquent was reclassified 1-A. The thrust of the Solicitor General's statement is that despite the fact that the petitioner was delinquent in fulfilling his obligations under the Act he was entitled to an exemption from induction as a divinity student. A similar interpretation was adopted and the Solicitor General's statement followed in *Kimball v Selective Service Local Board No. 15*, 67 Civ. 4733 (S.D.N.Y. 1968), where the court enjoined the petitioner's draft board from inducting him when the board had changed his classification from a 2-S (student deferment) to a 1-A classification while he was still eligible for a student deferment but after he had become delinquent. The Government seeks to distinguish *Oestereich* and *Kimball* on the ground that in those cases the local board changed the individual's draft status after he had been accorded his statutory exemption, whereas here the reclassification of defendant as 1-A followed in the normal course of affairs after he lost his student deferment upon graduating from college.

The distinction the Government suggests is not persuasive. If a person is entitled to a statutory exemption it seems to matter little whether the local board first gives the exemption and then takes it away or whether it fails to grant it in the first place. If the defendant was, in fact, a full-time divinity student in good standing at or about the time the local board made its

classification decision, it would appear that despite his delinquency he would be exempt from military service under § 456(g).

Such a determination would not result in the wholesale failure of persons to comply with Selective Service regulations. Firstly, the rule would apply only when the board clearly acts contrary to an exemption from military service which has expressly been granted by statute. Secondly, one who has such an exemption is not immune from criminal prosecution for failing to follow the prescribed procedures under the Act and Selective Service System's regulations. The mere fact that one is exempt from military duty does not grant him a license to ignore the regulations of the Selective Service System. This entire litigation seems to be an example of the vice inherent in an individual's failure properly to follow the appropriate procedures. To have done so would have been little burden on the defendant. Nor is the charge of failure to keep his notice of classification in his possession deficient merely because petitioner may be exempt from military service. This requirement has recently been commented upon by the Supreme Court in *United States v. O'Brien*, 36 U.S.L.W. 4469 (U.S. May 27, 1968). The statutory purpose of requiring such certificates to be carried does not relate to whether an individual is or is not exempt from military service. See, *id.*

The Government contends that the defendant has waived any statutory right he may have had to exemption under § 456(g) because he failed to give proper notice to his board of his divinity student status, although in May, 1967, prior to his delinquency as charged in this indictment, he apparently told F.B.I. agents who were investigating his activities that he had been accepted by Union Theological Seminary and that he intended to register there as a full-time divinity student. Defendant's Selective Service file indicates that the agents gave an oral report of their conversation with defendant to the

board and it seems likely that the board acted with full knowledge of the facts. In support of its contention of waiver the Government cites *Pickens v. Cox*, 282 F.2d 784, 785 (10th Cir. 1960). In that case, however, the claim of statutory exemption as a "sole surviving son," §456(o), was made in an application for a writ of habeas corpus only after the petitioner, who had served in the army for over a year, had been sentenced to seven years in prison upon his court martial for being absent without leave and being disobedient to a superior officer. This is not the case here and *Pickens* is not a basis for a determination of waiver in light of the Solicitor General's statement in *Oestereich* and the *Kimball* case. It is to be remembered that "a legally untutored registrant should not be penalized for his failure to distinguish between [two agencies of the Selective Service System]." *United States v. Stafford*, 389 F.2d 215, 218 (2d Cir. 1968). For a discussion of the general operation of the Selective Service System see Note, 76 YALE L.J. 160 (1966); Comment 54 CALIF. L. REV. 2123 (1966). The defendant might well have believed that the agents who interviewed him would report the conversation to his board, as indeed they appear to have done.

Despite what has been said it would not be appropriate to dismiss counts 1 and 2 at this time. The defendant suggests—and he bears the burden of establishing his right to an exemption, Application of Kanas, 385 F.2d 506, 508 (2d Cir. 1967)—that it is clear that he is a divinity student in good standing at a recognized divinity school and therefore exempt. The Government, however, does not concede the defendant's entitlement to divinity student status under §456(g). It is to be noted that the fact that one is registered at a divinity school is not enough for one to qualify for the §456(g) exemption. There are, at least potentially, the questions of whether the defendant intends in good faith to become a priest, whether the defendant's studies are of a kind that an honest student for the

priesthood would pursue, and whether the defendant is satisfactorily pursuing his studies. See *United States ex rel. Levy v. Cain*, 149 F.2d 338, 341 (2d Cir. 1945). Unfortunately, in view of the fact that there is no stipulation as to the defendant's status at the seminary, the Court is not in a position at this time to resolve the elements which may be necessary or relevant to a determination of the defendant's draft status. Additionally, whether one is a divinity student within the meaning of the Act presents an issue which is not as readily determined as one's age or sex, nothwithstanding defendant's suggestion to the contrary.

The defendant has also moved for discovery and inspection "in furtherance of this motion to dismiss the indictment and for the preparation of [his] defense." This motion is granted only to the extent consented to by the Government.

The motion to dismiss the indictment is denied without prejudice to its renewal before the trial court. It is so ordered.

Dated: New York, N.Y.
June 13, 1968

EDMUND L. PALMIERI
U.S.D.J.

EXCERPTS FROM TESTIMONY

[14] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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68 Cr. 186

UNITED STATES OF AMERICA,

– v –

VINCENT FRANCIS McGEE, JR.,

Defendant.

Before: HON. THOMAS F. MURPHY, D.J., and a Jury.

New York, November 8, 1968
10:30 o'clock a.m.

APPEARANCES

ROBERT M. MORGENTHAU, Esq., United States Attorney for the Government

By: JOHN R. ROBINSON, JR., Esq.,
Assistant United States Attorney

ROTH, CARLSON, KWIT & SPENGLER
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New York, New York 10017

By: ROBERT S. CARLSON, Esq.,
J. EDWARD MEYER, III, Esq., of counsel.

* * * *

[65]RICHARD P. CAREY, a witness called by Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CARLSON:

[66] Q What is your profession, Mr. Carey?

A I am a special agent with the Federal Bureau of Investigation.

* * * *

[66] Q Did you place a telephone call to Mrs. Kenny of Local Board 15 on June 23, 1967?

A Yes, sir, I did.

Q Did you speak to Mrs. Kenny?

A I did.

Q Who was Mrs. Kenny?

A Mrs. Kenny is one of the employees at Local Board 15 in Manhattan.

Q Do you recall that conversation?

* * * *

[67] MR. CARLSON: I am asking for the conversation.

Q What you told Mrs. Kenny and what she said to you.

A The purpose of my calling was a matter of an official investigation, which was at the time being conducted by our office.

Do you want me to tell you the nature of that investigation?

Q No, I do not. I want you, to the best of your recollection, state the substance of your telephone conversation with Mrs. Kenny.

A I asked Mrs. Kenny if Vincent Francis McGee, Jr. was a registrant of Local Board 15.

She replied that he was.

I asked her to furnish me with his Selective Service number, his present classification, [68] his present address.

If I may, I will refer to a note that was made immediately after the call. May I, your Honor?

THE COURT: Is it agreeable, counsel?

MR. CARLSON: Yes, it is.

THE COURT: Yes.

A On May 19, 1967, Mrs. M. Kenny, clerk, Panel A, advised from the files of Local Board 15 that Vincent Francis McGee, Jr., Selective Service No. 50-15-43-359 was presently classified 2S due to his attendance at the University of Rochester.

She gave his birth date as August 18, 1943, and advised that he has never applied for duplicating registration or classification cards.

Her records showed his permanent residence address as 501 West 122nd Street, New York City, New York.

Q Did you tell Mrs. Kenny anything else, Mr. Carey?

A I was the one asking for the information. Mrs. Kenny furnished the information I just read to you in answer to the queries that [69] I put to her.

Q I will repeat the question.

Did you tell Mrs. Kenny anything else?

A At that time, no.

Q At any time?

A I have had three separate contacts with Local Board 15 in this matter.

Q Mrs. Kenny was your first contact?

A Mrs. Kenny was my first and second contact.

Q You spoke with her twice?

A I had spoken to her previously.

Q What was the date of the previous call?

A It would have been May 11th of 1967.

Q What did you tell her on that occasion?

A At that time I was making again inquiries concerning Mr. McGee as a possible registrant of her board. This was an inquiry that was being relayed by one of the other FBI offices through me to determine if this person was actually or could actually be in possession of legitimate Selective Service cards.

Q Was anything else said in that [70] telephone call of May 11th, 1967?

A No, there was not.

* * * *

[84] Q Did you ever tell Mrs. Kenny that Mr. McGee planned in the fall of 1967 to attend Union Theological Seminary in the fall?

THE COURT: Excuse me, I am going to ask you to represent to me that you have some evidence to support this question.

MR. CARLSON: I have some evidence, [71] your Honor, and I am prepared to adduce it, if necessary.

THE COURT: All right. Thank you.

A I will have to explain something to you, sir.

Q Please answer the question.

Did you or didn't you?

A Did I tell her?

Q Yes.

A That he was going to attend Union Theological?

Q Yes.

A No, sir, not in those words.

Q What words did you use, Mr. Carey?

A If there was a reference to Union Theological, I did not have any knowledge of Mr. McGee's intention to attend there.

Q What did you tell Mrs. Kenny, Mr. Carey? I am not interested in the state of your knowledge. What did you tell Mrs. Kenny?

A If I can recall specifically, in the conversation, which followed the verification that he was indeed a registrant, and that he had a 2S classification, I would have then in some way [72] made reference to a question on my part as to what would the classification be. Would it be different if a person, like Mr. McGee, were to attend Union Theological Seminary.

Q Did you tell her that you were told that Mr. McGee planned to attend Union Theological Seminary?

MR. ROBINSON: I object to further questions. I don't think it is relevant to the case whether he was or was not.

THE COURT: I will listen to the end of it. I didn't hear the question, I'm sorry.

Did you tell her that?

Q You were told that Mr. McGee was planning to attend Union Theological Seminary in the fall of 1967?

THE COURT: I think that was the question just asked a little while ago.

MR. CARLSON: Your Honor, the witness has not answered the question. He has told me what he would have said, what he might have said. I want to know what he said.

THE COURT: Didn't he tell us within a few seconds ago that he didn't tell her that the [73] defendant was going to Union Theological Seminary?

Did you say that?

THE WITNESS: To the best of my knowledge, I did not tell her anything. If anything, in my conversation with her there could have been in an offhand way of attempting to get information, since he had a 2S classification, would there be a difference in his classification if he were to transfer from, say, University of Rochester to Union Theological Seminary.

* * * *

[84] LAURENCE N. JONES, a witness called by the Defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CARLSON:

Q By whom are you employed, sir?
A Union Theological Seminary.
Q What is your position at Union?
A Dean of Students and Admissions Officer.

* * * *

[85] Q Did there come a time when you met the defendant in this case, Vincent McGee?
A Yes.
Q When was that, sir?
A When he matriculated at Union in September 1967.

* * * *

[91] REDIRECT EXAMINATION BY MR. CARLSON:

Q Are there other Catholic students in attendance other than Mr. McGee?
A We have a number of Catholic students in attendance at Union, yes.
Q Are they candidates for the priesthood?
A A number of them have signified the intention of pursuing the priesthood, yes.

THE COURT: Anybody else?

RECROSS-EXAMINATION BY MR. ROBINSON:

Q Isn't it true that the majority of your students who are Catholics in your seminary [92] come from Catholic seminaries and attend certain courses at your seminary?
A There are several categories of students.

Q That is not my question, Doctor. My question was, isn't it true that most of the students who are Catholics in your seminary come from Catholic seminaries to take certain courses in your seminary?

A There are non-matriculating students, yes.

* * * *

[94] VINCENT FRANCIS McGEE, JR., the defendant herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MEYER:

* * * *

[107] Q Would you look at Government's Exhibit 16, which is called a Special Form for Conscientious Objectors; it is dated February 15, 1966, and tell us if that is the form you received back?

[108] A Yes, this is the form which I received and filled out and sent back to the Selective Service.

* * * *

[109] MR. MEYER: Your Honor, may I have permission to read several excerpts from this application?

THE COURT: Yes.

(Mr. Meyer read excerpts from the exhibit to the jury.)

* * * *

[118] Q Mr. McGee, will you describe the events which occurred after you had sent this letter to the President in the spring of 1967?

THE COURT: The events in the world?

[119] MR. MEYER: I am asking the events in relation to himself and again the Selective Service System.

A Well, after April 15 I went back—this event and the destruction of the card and the mailing of the letter had happened in New York, I went back to Rochester and I think it was about two or three weeks later I was called by the Federal Bureau of Investigation in Rochester and was informed over the telephone by an Agent Campbell, Dennis Campbell I believe was his name, that they had read in the Campus Newspaper of the University of Rochester that I had destroyed my draft card and mailed it to the President, and would I come down to their office and talk to them.

I did go down to their office and spoke with Agent Campbell and another FBI agent, whose name I think was John Kelly, and I spoke with them for about three hours and answered many questions about my motivations and my future plans.

I gave them three or four addresses where I would likely be in the fall, including [120] my parents' address in New York, and the dormitory address at Union Theological Seminary.

I remember that they took all these down and told them what my plans were for the summer.

* * * *

[122] Q In your conversation with the FBI Agents Kelly and Campbell, as you described, did you or did you not tell them that you were enrolled for the fall at Union Theological Seminary?

A Yes, I did. That was one of the addresses that I gave them.

THE COURT: The question was did you tell them that you were enrolled at the Union Theological Seminary?

THE WITNESS: Yes.

THE COURT: Yes, you say?

THE WITNESS: I think technically that is—I wasn't enrolled. I had been accepted for enrollment.

THE COURT: The question was that, but did you not tell us before that you gave them [123] the address of the Union Theological Seminary?

A I gave them the address, but I also—I did not tell I was enrolled.

THE COURT: No the answer is.

Q Did you tell them you had been accepted or made an application? What did you tell them about Union Theological Seminary?

A I told them I had been accepted for full time studies towards the Bachelor Divinity Degree to begin in, the studies to begin in September of 1967.

Q At Union Theological Seminary?

A That is correct, yes.

* * * *

[145] JEROME J. LANDE, called as a witness by defendant, being first duly sworn, testified as follows:

MR. MEYER: May I inquire, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION BY MR. MEYER:

Q Your name, sir, is Jerome Lande?

A That is right, sir.

Q Are you chairman of Local Board 15 of the Selective Service here in New York?

A Yes, sir.

* * * *

[156] Q Mr. Lande, I show you a copy of Government Exhibit 16 in this case, application for conscientious objector

by one Vincent McGee, and ask if you recall passing on that application.

MR. ROBINSON: Your Honor, may I suggest that the witness have the whole file in front of him?

MR. MEYER: Certainly.

MR. ROBINSON: So he can have a picture of what went on in this case.

MR. MEYER: Certainly, all he has to do is ask for it.

THE COURT: Do you need the file?

THE WITNESS: I recall passing on it, sir.

Q You recall passing on this in 1966, is that right? [157] A Yes.

Q What did you decide when you passed on this in 1966?

A To my memory, sir, I recall that there weren't sufficient facts in that to motivate me to grant the registrant the request he sought.

Q Namely, conscientious objector treatment, is that right?

A That's right.

Q Now, I would like to show you a letter, which is Government Exhibit 18, to the registrant from your board, which states:

"We wish to advise that your claim as conscientious objector will be considered when you no longer qualify for student classification."

A My answer, sir, referred to the time I received the applicant's application.

Q When did you receive his application?

A Whatever the date is stamped on that. I have no memory of it at the moment.

Q That date is stamped February 28, 1966, is that correct?

A I might not have seen it that day, but shortly thereafter. I don't make my office at [158] Selective Service, sir.

Q Did you instruct your clerk, B. Epstein, who signed this letter by your direction, to write that you had not considered

the application, but you were going to do so in the future as the letter states?

A I can answer that no.

Q What did you tell her to do? You just told us that you rejected the application?

A That's right, at that time, sir, because the young man was attending college and in my judgment he rated a 2S qualification which we proceeded to give him.

Q Now, Mr. Lande, you are changing your mind—

A I did not change my mind.

Q You said because of his beliefs?

A Sir?

Q I believe the record will show you said it was because of his belief that you—

A I cannot hear you.

Q I believe you said before that it was because of his beliefs that you failed to grant him a CO?

[159] A I did not say anything at all about his beliefs. You can refer to the record. I said in my opinion what he set forth did not motivate me to grant him the relief he sought.

Q Why was that again, Mr. Lande?

A Why was that again?

Q Yes.

A Because at that time reading his request in my consideration of it, sir, I came to the conclusion that he did not merit the relief he sought.

MR. ROBINSON: Your Honor, I think Mr. Lande has testified that Mr. McGee was a student at that time and therefore they gave him a 2S classification.

THE WITNESS: I did state that.

MR. MEYER: He didn't state that until he had seen the letter of March 23.

THE WITNESS: Oh, no.

Q Mr. Lande, did you make up your own mind on this matter?

A At that time, sure.

MR. ROBINSON: Your Honor, I object. There is no case law which supports any inquiry into what the draft board's mind was at the time of this [160] classification. The file was before the board and the purpose of the witness here today is to find out whether or not this classification in the CO form was considered before he was reclassified 1A in July.

THE COURT: The question was did you make up your mind. I don't see anything wrong with that question.

A I certainly did, sir.

Q Was it your own mind or was it always reviewed at some point by the draft board?

A At that time, not having seen the young man, it was my mind, sir.

Q Do you require to actually see a man?

A If a man comes in, the board will sit and listen to him, if he requests an appearance. Delighted to give it to him even though although sometimes they are not timely made.

Q Do you require a personal appearance in order to get a conscientious objector status?

A I do not, sir.

THE COURT: I am not too clear. When you say that you rejected the application for the CO, are you talking about you and the other members of the board or just you, yourself?

[161] THE WITNESS: Sir, the procedure is that when these forms come back ab initio, they are presented to the chairman for his consideration and his determination, and I so make it, sir.

THE COURT: So you made it as chairman of the board?

THE WITNESS: Correct, sir.

Q Did you ever review that decision of yours that you recall?

A I cannot remember, sir.

Q You don't remember ever reviewing it again?

A I cannot remember.

THE COURT: Try to keep your voice up. You have opposition outside and it is very hard.

Q I asked him whether he ever reviewed the decision he made in February 1966.

A I most likely did, but I cannot recall exactly.

MR. MEYER: He says he can't recall.

Q Is there anything that I could show you which might help you recall whether or not you ever reviewed that decision?

A I am sure there must be something in the [162] file. I would say that I did subsequently review it, yes.

Q What do you base that statement on?

A Because–

MR. ROBINSON: Can we make it clear whether or not the witness is requested to look at the file? He is testifying without the file.

MR. MEYER: All he has to do is ask for it, your Honor. He has total recall.

A I have reviewed it prior to sitting down here and talking and I recall that subsequently the young man finished his college or left college, I don't recall, and did not further merit a 2S deferment at which time, sir, based on nothing further in his file other than what we had already had in the file, we gave him a 1A classification. In doing that, sir, we again reviewed what appeared in the file.

* * * *

[163] Q Mr. Lande, I want to focus on this question again as to Form 150, the conscientious objector form, and ask you to tell us, yes, or if you can, whether there is something in the file that would show as a matter of record whether or not you, as chairman of the board, considered the CO application again for any reason?

A His original application?

Q Yes.

A I think I gave you my answer on that, Counselor.

Q What was?

A I repeated it to Judge Murphy just now. When these returns come in—

Q Wait a minute, wait a minute. Don't tell me about returns. I am asking about Vincent McGee—

THE COURT: Wait, you have to be more patient. You asked him for his reason and now he is allowed the widest, widest possible realm to explain his reason. It is a dangerous question, but you asked it.

A I will be more specific, Counselor.

[164] Q Thank you

A When Mr. McGee's return application came in asking for his deferment on the grounds of conscientious objector, sir, that was reviewed by me and read and carefully considered, as I consider all requests. And as I stated before, it was my considered judgment upon concluding the reading of it and my consideration that he did not rate the deferment.

* * * *

[164] Q Mr. Lande, am I correct in understanding that the decision with respect to this conscientious objector application was made, then, by you and not by the entire board?

THE COURT: Are you talking now about the original receipt of the application?

MR. MEYER: Yes, your Honor.

[165] THE COURT: Are you talking now about the original receipt of the application?

MR. MEYER: Yes, your Honor.

THE COURT: Or when they were told or learned that he no longer was in college.

MR. MEYER: The original receipt.

THE COURT: He said, as I recall it, that that was his decision.

Q Now, was the matter ever raised again?

A There was a review of his file when he concluded his schooling.

Q Who made that review?

A The board, as I recall.

Q When did they make the review?

A I don't recall.

Q What did they consider in making their review?

A The facts as they appeared in his file and his status at that time.

Q Mr. Lande, you are just answering that because that is what you do, isn't it? You don't have any specific recall about this case, do you?

MR. ROBINSON: I object. The file is before the Court.

THE COURT: Yes, it is argumentative.

A Of course it is. Sir, I have answered you to the best of my ability and truthfully. [166] Accept it or not as you see fit.

* * * *

[166] Q Can you tell us again what the basis was for reclassifiction of Vincent McGee as 1A in 1967?

A Sir, I believe he had been offered an alternative to the deferment he sought, which was a 1-O, hospital service. He did

not choose to avail himself of that. He was no longer in shcool and we had no alternative but to classify him 1A.

Q Would you show us someplace in the record where Mr. McGee, or tell us specifically from your recall, where Mr. McGee was ever offered 1-O, which is hospital service?

A I would have to see the file, sir.

* * * *

[167] (Pause.)

THE WITNESS: Counsel, it would appear from my review—

MR. ROBINSON: May we have the question read again that Mr. Meyer asked?

THE COURT: Do you forget it?

MR. ROBINSON: Yes, your Honor, I do.

THE COURT: I think it was, can you find something in the file which will refresh your recollection as to where it was or how it was that you offered the registrant 1-O classification.

MR. ROBINSON: Your Honor, I think that calls for the reasoning of the defendant. The internal processes of the basis of his decision and I object to the question.

MR. MEYER: Your Honor, it is admissible on the question of due process because they are telling us now—

THE COURT: Counsel, you have won. [168] I am going to let him answer.

Can you find anything, Mr. Lande?

THE WITNESS: Sir, of course it is a pretty thick file and I don't like to hold the Court and myself up. There was a letter written, which I find, I assume this is Government's 15, where we were advised that the young man would not accept a 1-O or inferred that he wouldn't.

Q Do you want to tell us what part of that letter you are referring to? This is the letter.

A Would you, sir? You asked me a question.

MR. MEYER: I would like the record to show that this is a letter from John Murray, a friend of the defendant's, to the local draft board accompanying the CO application.

A That's right. Reading from the second paragraph from the end about in the middle where it says:

"The writer in every case is certain that all of the convictions of the registrant are sincere and that if they are urged by him in support of an application to be classified 1-O, the writer urges that the sincerity and courage of the registrant [169] be respected and the application be approved."

Q Are you telling us, Mr. Lande, that because–

A Not because of that.

Q Let me finish the question. –because some friend of the defendant wrote and asked for a 1-O classification, that this man was given a 1-O classification, although nothing else in the record shows that fact?

A I didn't say it.

MR. ROBINSON: I think counsel is badgering the witness.

THE COURT: Not only that, but he is trying to scare him.

THE WITNESS: I don't scare easily, your Honor.

MR. MEYER: Your Honor, may I show you this letter?

THE COURT: Would you step back, please?

It is in evidence.

THE WITNESS: Sir, I did not say–I said what is in here in this letter from the alleged friend of the registrant–

[170] Q That is not the question I asked you, Mr. Lande.

A Even if you bang your hand twice it wouldn't change my testimony.

Q Answer the question if you can, sir.

A Don't bang your hand at me.

Q Can you tell us whether you gave the man a 1-O application and a 1-O classification, and if so, where it appears in the record?

A We did not give him a 1-O classification.

Q What did you tell us before then?

MR. ROBINSON: Your Honor, the government concedes he never got a 1-O classification.

* * * *

[171] Q Mr. Lande, I would like to ask you about the meeting of September 19, 1967, which Government Exhibit 3, which are your so-called minutes, reflects was the meeting at which you reclassified the defendant 1-A.

Do you recall that meeting?

A May I refer to Government 3, sir?

Q Please, sir.

A What was that date, sir?

THE COURT: December [sic] 19, 1967. That appears to be the date of the reclassification on the back of Exhibit 3.

A Yes, I have it, sir.

THE COURT: All right, he has it.

What is the question?

Q The question was, do you recall that particular reclassification at that meeting?

A Yes, sir.

[172] Q You do?

A Not in detail. I recall I was there and it would indicate I was there by the vote made, five to nothing. There are five members of the board. Of necessity I was one.

Q Is that why you say you were there because there was a five-nothing vote indicated?

A That's right, sir.

Q What were the names of the other draft board members who were there?

MR. ROBINSON: I object to that question. I don't think that is pertinent.

MR. MEYER: Your Honor, I believe it is relevant for two reasons.

THE COURT: But do you think he knows?

Do you know?

THE WITNESS: I can very well tell him that, sure. 1967 was only a year ago.

Arnold Boriss; Max Sclasinger; Francis McGuire–

Q Francis who?

A McGuire;–Saul Koenigsberg; and myself. I think that makes five, sir.

Q Can you tell us the circumstances of how [173] this matter of Vincent McGee on September 19, 1967 came before the board?

MR. ROBINSON: Your Honor, I think that is evidence from the record. Defense counsel can read that.

THE COURT: Do you recall, Mr. Lande?

THE WITNESS: To the best of my recollection, sir, at that time the registrant was no longer in school. Based on our previous determination that his request for conscientious objection status was denied, we had no alternative at that time but to give him a 1A, which we did.

Q You didn't consider the conscientious objector claim again because it had been denied previously?

A Yes –

MR. ROBINSON: The witness has already testified he did consider.

THE COURT: I don't know whether you think you are back in the old First Manhattan or not. You probably don't know where the First Manhattan was.

THE WITNESS: I remember very well, on Grand Street.

THE COURT: Come on, Counsel, please.

MR. MEYER: Could you read the answer back to me, please.

(Record read.)

Q It is important, Mr. Lande, I am sorry to reiterate—

MR. MEYER: Your Honor, I apologize to you, too.

Q I want to know when it was you denied the CO application that you just referred to?

MR. ROBINSON: Your Honor, I think the record reflects in Government's Exhibit 18.

A When it came in, sir.

Q When it came in in February?

A When I reviewed it shortly after the date stamped on it. I might have been there that day, I don't recall exactly, but it was within a short time thereafter.

Q Was it your practice or was it not your practice when you made a reclassification to look back through the record?

A It was my practice and is my practice.

Q Is it the board's practice?

A And it is the board's practice.

[175] Q Do you recall a letter from your review this morning or otherwise that this registrant wrote to the President of the United States?

A Yes, sir.

Q You recall considering at the time or do you just not have any recall? At the time I mean back in that meeting on September 19, 1967.

A I recall, sir, that we reviewed the record of the young man's case when we gave him the 1A and all pertinent information therein contained.

* * * * *

[175] Q Do you recall the statement in that letter, I am quoting:

"I have already been accepted for graduate study in a program where I would probably qualify for the theological deferment"?

A I know that I read it at that time, sir, and the statement, as you just quoted, is something the young man anticipated and we are constrained, sir, to classify the registrant based on his current status, not something in futuro.

Q The fact that a person has been accepted in a status is not good enough, is that it?

A That is a mere assertion of conclusion by a registrant is not sufficient, no.

Q Does this kind of a conclusion lead the board to make inquiries as to the status?

A The onus is on the registrant to supply us with a certificate from his proposed school to which he anticipates attending that he is a registered student there carrying whatever the course is and so forth. Upon receipt of that it is given full credence.

Q Mr. Lande, can you tell me—I may be ignorant of this—can you tell me where in the law the burden is put upon a registrant to give the local board a certificate from the school showing he is at school?

A We are not constrained to make a classification based on something that a registrant says will happen in the future.

* * * *

[181] CROSS EXAMINATION BY MR. ROBINSON:

* * * *

[182] Q May the record reflect I am handing the witness Government's Exhibit 3, which is the minutes of action for the witness to refer to.

Mr. Lande, is it your testimony that you considered the whole file or the board considered the whole file—is it your testimony that the board considered the whole file before it reclassified Mr. McGee 1A on September 19, 1967?

A That is correct, sir.

[183] VINCENT FRANCIS McGEE, JR., resumed.

MR. MEYER: Your Honor, I ended on [184] Friday.

THE COURT: Yes, Mr. Robinson.

CROSS-EXAMINATION BY MR. ROBINSON:

* * * *

[190] Q You are aware of the fact, then, that you could appeal your classification?

A I was aware of the fact that I could apply for a student classification.

Q Or any other classification?

A That I had to apply for one, that is correct.

Q Or any other classification you wished, is that correct?

A Yes.

* * * *

[207] THE COURT: He wants to know, didn't some of your witnesses say you are attending divinity school with regularity and pursuing a course in that seminary?

THE WITNESS: Yes.

Q You never made that claim to the draft board, isn't that correct, Mr. McGee?

A That claim is made in my letter of April 15 to the President and this was sent to the draft board.

Q You assume by some curious process of osmosis that the draft board could decipher from that letter that you are a divinity student, is that correct?

A Yes, of course. I also told that to the FBI and I also told that to you at a grand jury hearing before some of these charges came into effect and since you presented the charges to both grand juries, I am sure that knowledge was there on the table.

Q You were before the grand jury, were you not? [208] A The one in November of last year, yes, sir.

Q That did not concern this case, did it? It concerned the burning of your draft card, isn't that correct?

A Yes.

* * * *

[212] REDIRECT EXAMINATION BY MR. MEYER:

Q Mr. McGee, Mr. Robinson just asked you whether or not it isn't a fact that the grand jury investigation in November of 1967 concerned the burning of your draft card and not other matters.

A Yes.

* * * *

[214] Q Were you asked and did you give testimony before the grand jury in November 1967 regarding your divinity student status?

A Yes, I was. I indicated very clearly that I was a student at Union Theological Seminary and that this fit into my history that I was intending to go on to study for the ministry, the Roman Catholic priesthood.

[225] MR. CARLSON: Yes.

If your Honor please, the defendant at this time moves for a judgment of acquittal.

* * * *

[237] MR. CARLSON: The third ground of the motion—I will have two more grounds which I will dwell on briefly. The third ground is had on the failure of the board, I say, on the evidence before your Honor to reconsider defendant's application for conscientious objector on September 19, 1967. The board might have denied it; they might have granted it, but I say they at least should have considered it. That was their obligation under the law.

THE COURT: Don't you think that is the testimony of Mr. Lande?

MR. CARLSON: Yes, your Honor, I listened to it very carefully and I heard him say, if my notes are correct, that on September 19 he reviewed the whole file, but they classified this man 1A because they had rejected his conscientious objector application back in 1966.

That to me meant that they did not reconsider it.

[238] THE COURT: He said the whole board reviewed it, as I recall him saying it. They might have been wrong and if they were, there was an opportunity to appeal.

MR. CARLSON: With the latter comment I agree, your Honor. Our position is, if I am right on my recollection of the evidence, that they at least had to reconsider it at that point.

* * * *

[281] THE CLERK: The Court is about to charge the jury. Any spectator wishing to leave will do so now or remain in their places until the completion of the Court's charge.

Marshal.

THE COURT:

* * * *

[287] In order to convict the defendant of the crime charged in Count 4, you must be satisfied [288] beyond a reasonable doubt of the following elements: (1) that the defendant was a registrant of Local Board 15 under the Military Selective Service Act of 1967; (2) that he was mailed by Local Board 15 a current information questionnaire requesting information concerning his mailing address, occupational, marital, family, dependency and military status and physical condition and the receipt of a professional degree; (3) that on or about the 3rd of July, 1967, he unlawfully and knowingly failed, neglected and refused to submit such information for which the local board had mailed him a request.

* * * *

[289] In order to find the defendant knowingly violated the duty to submit a current information questionnaire to his local board, you must find that he was aware of this duty and that he deliberately refused to do so.

* * * *

[300] THE COURT: I will deny those motions. You have an exception.

I think I should at this time, too, make certain findings. I find as a fact that the defendant at the present

time and at the time of his [301] refusal to be inducted was pursuing a full-time course of instructions in a recognized theological divinity school, namely, Union Theological Seminary here in Manhattan.

I do not find, however, that such a school was under the direction of a recognized church or religious organization, but rather it was, according to the testimony of the dean of students, a non-denominational seminary.

I also find as a fact that the draft board considered the defendant's application for a conscientious objector status and that was considered by the whole board on September 23.

Was that the date of the classification 1A, Mr. Robinson?

MR. ROBINSON: September 19, 1967.

THE COURT: September 19, 1967.

* * * *

EXHIBITS

Government's Exhibit 3

Classification Questionnaire
(SSS Form 100)

[See Opposite]

CLASSIFICATION QUESTIONNAIRE

Selective Service System
Local BOARD NO. 15
321 West 44th Street
New York 36, N. Y.

(Local Board Stamp)

RETURN THIS QUESTIONNAIRE ON OR BEFORE

Date of mailing 8-18-61

Date received back at local board

1. Name of Registrant (Last, First, Middle)	2. Selective Service No.	3. Date of Birth (Month, Day, Year)
Mc Gee, Vincent Francis Jr	50 15 43 37 9	Aug 16 1943

4. Mailing address: 501 W 122 St (Number and street or R.F.D. route) Apt 4D (City, town, or village) (Zone) (County) (State)

(The above items, except the date received back at local board, are to be filled in by the local board clerk before the questionnaire is mailed to the registrant.)

INSTRUCTIONS

You are required by law to fill out and return this questionnaire on or before the date shown in the box to the right above in order that your local board will have information to enable it to classify you. A notice of your classification will be mailed to you. When the questions in any series do not apply, enter "None" or "Does not apply." If you wish to submit additional information enter it on page 6.

After this questionnaire has been completed you are required to report to your local board, within 10 days after it occurs, any change of address, any change in marital or dependency status, any change in place of employment or occupation, or any other new fact which may affect your classification.

Fill out on typewriter or print in ink.

B. Peterson
Member or Clerk of local board

STATEMENTS OF THE REGISTRANT

Confidential as Prescribed in the Selective Service Regulations

Series I.—IDENTIFICATION D.O.B. AUG. 18, 1943

1. Name of Registrant (Last, First, Middle)	2. Place of Birth
McGEE, VINCENT FRANCIS F. (JR.) (MIDDLE)	AYRE, MASSACHUSETTS
3. Other names used	**4. Citizen or Subject of**
NONE	U.S.A.

5. Description

(a) Color Eyes	(b) Color Hair	(c) Weight	(d) Height	(e) Complexion
BLUE	BROWN	162	5' 11"	~~DARK~~ LT MED.

6. Present Address: 501 WEST 122 ST. APT. 40 (Number and street or R.F.D. route) NEW YORK (City, town, or village) 27 (Zone) N.Y. (County) N.Y. (State)

7. Telephone No. (If none, enter "None")	8. Social Security No. (If none, enter "None")
MO 62676	124-32-9921

9. Name and address of person other than a member of your household who will always know your address: MISS MARGARET M. COLLINS (Name) 501 W. 122 ST. N.Y. 27 (Address)

SSS Form No. 100 (Revised 5-26-60) Supplies of previous printings shall be used until exhausted.

GPO—15—75967-1—F

Series II.—MILITARY RECORD

1. If you are now on or have been separated from active military service enter (*a*) Armed Force NONE
   (*b*) Service Number..... (*c*) Date of entry.....
   (*d*) Date of separation..... (*e*) Type of separation.....
2. If you are now a member of a Reserve Component (Including the National Guard) give (*a*) Name and Address of Unit.....
   (*b*) Service Number..... (*c*) Date of enlistment or appointment.....
3. If you are now a member of a Reserve Officer Training Corps or any other officer procurement program, state the program, the Armed Force, and date of entry.....

Series III.—MARITAL STATUS AND DEPENDENTS

(Use Page 6, if necessary.)

1. (*a*) (check one) ☑ I have never been married; ☐ I am a widower; ☐ I am divorced; ☐ I am married.
   (*b*) I (check one) ☐ do ☐ do not live with my wife; if not, her address is.....
   .....
   (*c*) We were married at..... (Place) on..... (Date)
2. I have... (Number) children under 18 years of age of whom... (Number) live with me in my home.
3. The following other persons are wholly or partially dependent upon me for support.

Dependent	Relationship	Age	Approximate Income (Annual)	Amount Contributed by Me
Name Address			$	$
Name Address			$	$
Name Address			$	$
Name Address			$	$

If you are the father of an unborn child attach a statement from a physician showing the basis for his diagnosis and the expected date of birth.

Series IV.—REGISTRANT'S FAMILY

Listed below are all the living members of my immediate family over 18 years of age (except those shown in Series III) including my father, mother, brothers, sisters, father-in-law and mother-in-law. (Use Page 6, if necessary.)

	Relationship	Age	Estimated Ability to Contribute to Support of Claimed Dependents [1]
Name VINCENT F. McGEE SR Address 501 W. 122 ST. N.Y. 27	FATHER		
Name HELEN T. McGEE Address 501 W. 122 ST N.Y. 27	MOTHER		
Name GERALD J. McGEE Address 501 W 122 ST. N.Y. 27	BROTHER	18	
Name PATRICIA F. McGEE Address 501 W. 122 ST. N.Y. 27	SISTER	13	
Name KEVIN M. McGEE Address 501 W. 122 ST. N.Y. 27	BROTHER	8	
Name Address			

[1] Enter here your opinion as to whether the family member can or cannot contribute to the support of a particular claimed dependent, and to what extent.

C30—16—73367-1—F

Series V.—OCCUPATION

If Engaged in Agriculture, Also Fill in Series VI

1. The job I am now working at is (give full title, for example: construction draftsman, turret-lathe operator, stationary engineer, farm laborer, physics teacher, policeman, marriage-license clerk, etc.)

2. I do the following kind of work in my present job. (Be specific. Give a brief statement of your duties.)

UN EMPLOYED

3. My employer is .....
(Name of organization or proprietor, not foreman or supervisor enter "Self" if self-employed)

.....
(Address of place of employment—Street, or R.F.D. Route, City, and State)

whose business is .....
(Nature of business, service rendered, or chief product)

4. (*a*) I was employed by my present employer on .....
(Date)

(*b*) I entered the job described in items 1 and 2, this series, on .....
(Date)

(*c*) I am paid at the rate of $..... ☐ per hour ☐ day ☐ week ☐ month.

(*d*) I work an average of ..... hours per week.

5. Other business or work in which I am now engaged in is .....
(Nature of business, if none, enter "NONE")

6. Other occupational qualifications, including hobbies, I possess are .....

7. My prior work experience is .....

Series VI.—AGRICULTURAL OCCUPATION

1. I am (check one) ☐ Sole owner-operator of a farm ☐ Joint owner-operator with another ☐ Hired manager ☐ Cash tenant or renter ☐ Standing rent tenant ☐ Sharecropper ☐ Share tenant ☐ Wage hand (hired man) ☐ Unpaid family worker.

2. I have been engaged in farm work continuously since .....
(Date)

3. I (check one) ☐ am ☐ am not personally responsible for the operation of the farm where I work.

4. The principal crops and livestock of the farm I operate or work on are:

Names of Crops	Acres Devoted to Each	Kinds of Livestock	No. of Each Now on Farm

5. Principal products marketed during the last 2 years.....

6. Total value of products sold from this farm during the last crop year $.....

7. The number of year-round workers on this farm is ..... (Number) of whom ..... (Number) are hired hands.

8. Other farm experience .....

C80—16—73567-1—P

Series VII.—MINISTER OR STUDENT PREPARING FOR THE MINISTRY

1. I have been a minister of the ..... (Name of sect or denomination) since ..... (Month) (Day) (Year)
and I (check one) ☐ HAVE ☐ HAVE NOT been formally ordained.

2. I was formally ordained at .....
on (date) ..... by .....

3. I am a student preparing for the ministry at the CATHEDRAL COLLEGE OF ST. JOSEPH'S SEMINARY (Name and address of theological or divinity school)
555 WEST END AVENUE NY 24 under the direction of ROMAN CATHOLIC CHURCH (Name of church or religious organization)
.....

4. I am a student preparing for the ministry under the direction of ..... (Name of church or religious organization)
pursuing a full-time course of instruction at the ..... (Name and address of school)
leading to my entrance into ..... (Name and address of theological or divinity school)
in which I have been pre-enrolled.

Series VIII.—CONSCIENTIOUS OBJECTOR

(Do Not Sign This Series Unless You Claim Exemption as a Conscientious Objector)

By reason of religious training and belief I am conscientiously opposed to participation in war in any form and hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150).

..... (Signature)

Series IX.—EDUCATION

(Use Page 6, if necessary.)

1. (a) I have completed 8 years of Grade School, ... years of Junior High School, 4 years of High School, ... years of Trade or Business School. I (check one) ☒ DID ☐ DID NOT graduate from High School.
(b) In Trade or Business School I pursued courses in .....

2. (a) I have completed ..... years of College, majoring in .....
at ..... (Name and address of institution) and (check one) ☐ HAVE ☐ HAVE NOT received a degree.
(b) I have received the degree(s) of .....

3. I am a full-time student at CATHEDRAL COLLEGE OF ST. JOSEPH'S SEMINARY 555 West End Ave. N.Y.2 (Name and address of institution)
majoring in LIBERAL ARTS preparing for MINISTRY (Occupation or profession)
and expect to receive a degree on JUNE 1965 (Date)

Series X.—STATEMENT OF ALIEN

1. I was admitted to the United States for (check one) ☐ permanent ☐ temporary residence
on ..... (Date of entry)

2. My Alien Registration Receipt Card Number is .....
If you have not been admitted to the United States for permanent residence, enter on page 6 a supplemental statement setting out the date you first entered the United States, with the dates of each subsequent departure and reentry when applicable. Attach copies of documentary evidence in your possession verifying your claimed alien status.

C88—16—78967-1—1

Series XI.—PHYSICAL CONDITION

1. If you were ever rejected for service in the Armed Forces state (1) when ..... No .....
(2) where .....

2. If you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces, state the condition ..... No .....

3. If you have ever been an inmate or a patient in a mental or tuberculosis hospital or institution, give the name and address of each hospital or institution. ..... No .....

Series XII.—COURT RECORD

If you have been convicted of a crime or crimes other than minor traffic violations complete this series. If none enter "NONE."

Offense (other than minor traffic violations)	Date of Conviction (Month, Day, Year)	Court (Name and Location)	Sentence
NONE			

2. I (check one) ☐ AM ☑ AM NOT now being retained in the custody of a court of criminal jurisdiction, or other civil authority. Specify ..... (Awaiting trial, on parole, etc.)

Series XIII.—SOLE SURVIVING SON

I (check one) ☐ AM ☑ AM NOT the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service.

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. You are required to make the registrant's certificate. 2. If you cannot read, the questions and your answers thereto shall be read to you by the person who assists you in completing this questionnaire. 3. If you are unable to sign your name, you shall make your mark in the space provided for your signature in the presence of a person who shall sign as witness.

NOTICE.—Imprisonment for not more than 5 years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended.)

I certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief.

Sept. 7, 1961 (Date) Registrant sign here → Vincent J. McKee, Jr. (Signature or mark of registrant)

..... (Date) ..... (Signature of witness to mark of registrant)

If anyone has assisted you in completing this questionnaire, such person shall sign the following statement: I have assisted the registrant herein named in preparation of this questionnaire because .....

..... (For example—registrant unable to read and write English, etc.)

..... (Signature of person who has assisted)

..... (No. and Street or P.O. Address)

Date ..... (City) (Zone) (State)

CSC—16—78667-1—9

Series XIV.—STATEMENT OF REGISTRANT

(Use additional sheets if desired)

(Signature of Registrant)

(Date)

CSS—16—75667-1—F

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President (Continued from Page 8)	Vote	
		Yes	No

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Vote Yes	Vote No
9-15-61	#2 mailed - BB		
T-29-63	127 mailed BB		
8-6-63	127 rec'd with ltr re: school BB		
SEP 10 1963	Class 1-A BM Gr-3	3	0
9-11-63	#110 mailed - BB		
AUG 7 1964	Pre notice mld for 8-21-64 BB		
AUG 10 1964	Papers to station 9		
8-28-64	DD 67 rec'd - accepted. BB		
9-17-64	Ltr from registrant - Address noted - student	-	BB
9-17-64	Misc SSS #50 mailed BB		
10-1-64	#109 rec'd BB		
OCT 20 1964	Class 2-S BB	3	0
10-21-64	FORM 110 (NOTICE OF CLASSIFICATION) MAILED		
4-8-65	Recd. notification from reg. change of add. noted. RB		
SEP 20 1965	Cl. 1-A	4	0
SEP 21 1965	SSS FORM NO. 110 MAILED LB		
9-29-65	Ltr rec'd from Eastman Kodak BB		
9-30-65	#109 rec'd - Full-time, matriculated BB		
10-1-65	Ltr from registrant re: student status. BB		
10-19-65	Class 2-S BB	3	0
OCT 20 1965	SSS FORM NO. 110 MAILED		
2-14-66	Rec'd ltr from reg. advising he is Consc. Obj. CR		
2-15-66	Form 150 mld. for 2-25-66 CR		
2-28-66	#150 returned. Claims to be opposed to any service including Civilian work - BB		

(Continue on Page 7)

SELECTIVE SERVICE SYSTEM—CLASSIFICATION QUESTIONNAIRE
MINUTES OF ACTION—CONTINUED

NAME OF REGISTRANT: Joe [illegible] Vincent Francis Jr

SELECTIVE SERVICE NO.: 50 IT 43 319

Dates	Minutes of Actions by Local Board, Appeal Board, and on Appeal to the President	Vote Yes	Vote No
3-17-66	#109 recd - Full-time grad circulates - 22		
MAR 22 1966	WD Reopening	4	0
3-23-66	Ltr mailed		
4-7-66	Change add. recd & noted		
7-13-66	Form #109 recd. Full time student ranked upper 3/4 of the male students in his class.		
7-18-66	Dup. form #109 recd. Upper 3/4		
9-21-66	Acknd ltr -		
9-29-66	#113 recd - Ltr in Ware J Roberts		
OCT 18 1966	Class 2-S	3	
OCT 19 1966	MAILED SSS FORM 110		
10-24-66	Mems mailed to Hdqtrs		
4-27-67	Rec'd copy of registrants letter to President, USA; dtd 4/15/67; reply SSS Wash.D.C.; and copy ltr from SSS Wash. D.C. to USATTY Wash., D.C. with SSS No. 90 - covering letter NYC HDQS.		
MAY 18 1967	WD Reopening	3	
5-19-67	#59 recd		
6-23-67	Refer to 119		
7/3/67	Form 109 recd: has graduated		
7/3/67	Form 127 sent to reg. for July 13, 1967		
7-14-67	Postcard - registrant traveling - will return 8/67		
7-25-67	Ltr from registrant - refuses to comply with SSL		
SEP 19 1967	Class 1-A	5	0
SEP 20 1967	FORM 110 MAILED #7717.		
9-26-67	#110 - 2A? will call - Refused physical & induction [illegible]		

To be used to provide additional pages of SSS Form No. 100 when more space is required for recording Minutes of Actions by Local Board, Appeal Board, and on Appeal to the President.

16—70641-1 U. S. GOVERNMENT PRINTING OFFICE

SSS Form No. 100-S (Revised 10-11-56)

SELECTIVE SERVICE SYSTEM
MINUTES OF ACTION—CONTINUATION SHEET

Approved not required.

NAME OF REGISTRANT OR STANDBY RESERVIST: Jr. Gil, Vincent F

SS OR SR NUMBER: 50 5 43 357

Dates	Minutes of Actions	Vote Yes	Vote No
OCT 4 1967	SSS FORM 223 MAILED FOR OCT 18 1967 Ck		
10-9-67	Local Order "Refused" returned 2B		
10-10-67	Papers to station		
10-31-67	Failed report Prem 10-18-67		
11-21-67	DECLARE DELINQUENT Failed to report for Pre-Exam 10-18-67 Date Delin		
11-25-67	#304 mld & signed 3rd		
11-28-67	Input, with card with notation returned to		
DEC 19 1967	PT Order to Delin Bd.		
1-11-68	INDUCTION NOTICE MAILED for Jan 29/68		
1-11-68	C.C. mld (252) to 501 Div Ad		
1-18-68	Papers to station		
1-26-68	Refer #119 - File submitted USA		
1-29-68	Delivery List Executed. Returned to Induction		
1-31-68	File returned with ltr - to report on 2-1-		
1-31-68	Copy ltr from AFEES Med - directed to U.S. Atty		
1/31/68	Reported on #301 to U.S. ATTORNEY		
1-31-68	File submitted U.S. Attorney		

To be used to provide additional pages of the Standby Reserve Questionnaire (SSS Form 80) or Classification Questionnaire (SSS Form 100) when more space is required for recording minutes of actions.

SSS Form 89 (12-20-61)

GPO 885-775

Government's Exhibit 15

Letter dated February 25, 1966 from John A. Murray to Local Board in support of application for conscientious objector status

[See Opposite]

WISER, SHAW, FREEMAN, VAN GRAAFEILAND, HARTER & SECREST

WILLIAM F. STRANG 1883-1960
CORNELIUS R. WRIGHT 1887-1966
EDWARD W. ICKES 1903-1966
WILLIAM C. COMBS
C. VINCENT WISER
JOHN G. SHAW
HYMAN B. FREEMAN
E. A. VAN GRAAFEILAND
DONALD R. HARTER
RICHARD B. SECREST
R. CLINTON EMERY
BRUCE E. HANSEN
HARRY M. GRACE
JOHN E. SHETT

800 POWERS BUILDING
16 MAIN STREET WEST ROCHESTER, NEW YORK 14614
TELEPHONE: 232-6500

DAVID D. DINAN
THOMAS P. MOONAN
THOMAS A. SOLBERG
JOHN M. LOFTUS
NATHAN J. ROSECOEL
WILLIAM A. NICELY
JOHN F. MAHON
ALAN ILLIG
JOHN E. BLYTH
JAMES A. ROBINSON
W. REYNOLDS SOMERS
PETER G. NASH
LAWRENCE S. PALMER
WILLIAM D. SMITH
ALAN F. HILFIKER
D. DYSON DAY
JOHN A. MURRAY
BARRY R. ARMTMAN

Selective Service System
LOCAL BOARD No. 15

FEB 28 1966

321 West 44th Street
New York, N.Y. 10036

February 25, 1966

Selective Service System
Local Board #15
321 West 44th Street
New York, New York 10036

Re: Vincent Francis McGee, Jr.
S.S. #50 15 43 359

Gentlemen:

This letter is written in support of the application filed, or to be filed, by the above registrant for classification I-O.

The writer has been acquainted with the registrant since 1963, having met him in shared activities of the Graduate Newman Club of Columbia University in New York City. The writer and registrant removed to the City of Rochester in the fall of 1964, and for a period of approximately one-half year, shared an apartment at #158 Manor Parkway in that city.

During that time, the writer formed of the registrant an opinion which has not altered to date, that the registrant is habitually fair, courageous, and temperate, with a degree of prudence extraordinary for a man of his youth. In addition, the writer is of the opinion that the personality of the registrant has been strongly influenced and formed by his associations with institutions and clergy of the Roman Catholic Church. These influences have affected the registrant from his earliest youth in New York City, forming his character and religious beliefs in the image of an enthusiastic, forward-looking and humanitarian zeal for the reformation and propagation of his religious faith.

The registrant is genuinely concerned to make his religious faith relevant, meaningful and effective within the liberal

93a

intellectual and social atmosphere of the city in which he has been raised. This concern has brought the registrant to convictions with respect to his duties toward his church and toward his country, some of which are outside of the current of the more common opinions of responsible persons. Some of these convictions the writer shares, particularly those in reference to his church. The writer in every case is certain that all of the convictions of the registrant are sincere, and that if they are urged by him in support of an application to be classified I-O, the writer urges that the sincerity and courage of the registrant be respected, and the application be approved.

Kindly forward all notices of classification or reclassification affecting the registrant on Selective Service Form #111 to the writer at the following address:

P.O. Box 3174, Federal Station
Rochester, New York 14614

Very truly yours,

John A. Murray

JAM:cma

cc: V.F. McGee, Jr.
1100 Genesee Street
Rochester, New York 14619

Government's Exhibit 16

Special Form for Conscientious Objector
(SSS Form 150)

[See Opposite]

VINCENT F. McGEE, JR.

February 24, 1966

ADDITIONAL CLAIM AND STATEMENT OF CONSCIENTIOUS OBJECTION

I, Vincent F. McGee, Jr., Selective Service No. 50 15 43 359, am, by reason of my religious training amd belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation/noncombatant training and service in the Armed Forces and further conscientiously opposed to obligatory compensatory service in civilian work contributing to the maintainance of the national health, safety or interest as the Selective Service System deems appropriate.

I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces and from obligatory compensatory service in such civilian work contributing to the maintainance of the national health, safety or interest as the Selective Service deems appropriate.

Vincent F. McGee Jr.

Selective Service System
LOCAL BOARD No. 15

FEB 28 1966

321 West 44th Street
New York, N.Y. 10036

LOCAL BOARD COPY

SELECTIVE SERVICE SYSTEM

FEB 28 1966

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

321 West 44th Street
New York, N.Y. 10036

Selective Service System
LOCAL BOARD NO. 15
321 West 44th Street
New York 36, New York
(Local Board Stamp)

THIS FORM MUST BE RETURNED ON OR BEFORE
FEB 25 1966
(Ten days after mailing or issue)

Date of mailing or issue FEB 15 1966
Date received back at local board 2-28-66

1. Name of Registrant			2. Selective Service No.
McGEE, JR.	Vincent	Francis	50 15 43 359
(Last)	(First)	(Middle)	

3. Mailing address: 1170 Genesee Street, Rochester, 14611, N.Y.
(Number and street or R.F.D. route) (City, town, or village) (Zone) (County) (State)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form No. 100).

The items in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION *

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form, and I am

Neither A, nor B are acceptable to the undersigned Claimant.

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. Therefore, I claim exemption from both combatant and noncombatant training and service in the Armed Forces.

(* See additional statement and disclaimer

Vincent F McGee Jr.

(Signature of registrant)

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEF

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Do you believe in a Supreme Being? ☒ Yes ☐ No

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

I believe in a personal Supreme Being to whom obligations to persons within limits of human relations are considered secondary. I believe further that participation in any form of military operation indicates an approval/consent situation repugnant to my belief in duties consequent to love and service of God and fellow man.

SSS Form No. 1 (Revised 1-1-62) 16-27000-1 [illegible]

2. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

My training and acquired belief derives from usual religious indoctrination and training in a Roman Catholic home in a religiously oriented one supported by instruction in Religious Classes and Secondary schools plus an deep personal commitment to a life of Christian witness in the world which derives from many personal relationships and wide reading, discussion and observation.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

The Reverend Benedict Tighe, OSB.
Mount Saviour Monastery, Pine City, New York 14871

5. Under what circumstances, if any, do you believe in the use of force?

I believe in no use of force beyond the personal physical restraint - without any other means being used - of any individual bent on harming another person - where verbal and moral force of example have been exhausted.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

Early in my life I determined on a vocation to the religious life - one of service to men in a relationship to God and the expression of this love, I found in life. I spent 5½ years in an Marian Missionary Community (Cathedral College + H.S.) and resigned to live more closely associated with the concrete situations of modern man while keeping a stance of vocation and dedication to God and them clearly in sight. It is my intention to continue on to ordination.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

Yes. Fall, 1965, Democrat + Chronicle, Rochester, NY - letters responding to an add calling attention to the Viet-Nam situation.
I took part in the March for Peace in Viet-Nam in Washington D.C. Nov. 25, 1965.
It is my custom to wear, frequently, in public areas, the Peace Symbol ☮, easily known to all which occasions frequent discussions, harassment, and concrete situations of witness to peaceful, moral argument as means to lasting and complete peace.

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended From	Dates Attended To
CORPUS CHRISTI SCHOOL	CATHOLIC ELEM.	NEW YORK CITY	1945	1951
CATHEDRAL COLLEGE + PREP.	H.S. + JR. COLL. SEMINARY	NEW YORK CITY	1957	1963
HUNTER COLLEGE (EVENING)	COLLEGE - PUBLIC	NEW YORK CITY	1963	1964
UNIVERSITY OF ROCHESTER	PRIVATE COLLEGE	ROCHESTER, NEW YORK	1964	PRESENT
			19....	19....

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Worked From—	Period Worked To—
CAMP COUNSELLOR	CATHOLIC YOUTH ORGANIZ.	110 E. 23rd St., NYC, NY	Summer 1958	Summer 1959
LIBRARY WORK, ETC.	COLUMBIA UNIV.	N.Y.C. 10027	19.1960	19.1962
ERRANDS, DELIVERY	MORNINGSIDE DIST.	N.Y.C. 10027	19.1961	19.1962
RECEPTION, LABOR ETC.	CORPUS CHRISTI CHURCH	N.Y.C. 10027	19.57	19.62
OFFICE CLERK	[illegible]	119 W 57th St. NYC 10019	19.63	19.64
FACTORY	EASTMAN KODAK CO.	ROCHESTER, N.Y.	19.65	19.66

3. Give all addresses and dates of residence where you have formerly lived.

Name of City, Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence From—	To—
BOSTON, MASSACHUSETTS		FAYATTE STREET	19 43	19 44
NEW YORK CITY	NEW YORK	93 LA SALLE STREET	19 44	19 52
NEW YORK CITY	NEW YORK	501 WEST 122 STREET	19 52	19 64
ROCHESTER	NEW YORK	165 MINDER PKWY	19 64	19 65
ROCHESTER	NEW YORK	1170 GENESEE STREET	19 65	19 66
			19	19

4. Give the name and address of your parents and indicate whether they are living or not.

VINCENT F. AND HELEN T. MCGEE, 501 WEST 122nd STREET, NEW YORK, N.Y. 10027, BOTH LIVING.

5. (a) State the religious denomination or sect of your father ROMAN CATHOLIC

(b) State the religious denomination or sect of your mother ROMAN CATHOLIC

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Every item in this series must be completed. If more space is needed use extra sheets of paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

NO MEMBERSHIP

2. Are you a member of a religious sect or organization? ☒ Yes ☐ No. If your reply to item 2 is "yes," complete items (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

ROMAN CATHOLIC CHURCH, POPE PAUL VI, VATICAN CITY STATE, EUROPE

(b) When, where, and how did you become a member of said sect or organization?

BY BAPTISM, SEPTEMBER 19, 1943, ST. JAMES CHURCH, HARRISON AVENUE, BOSTON, MASSACHUSETTS

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

NEWMAN CLUB, UNIVERSITY OF ROCHESTER, ROCHESTER, NEW YORK 14627

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

REV. L. JOHN HEDGES, NEWMAN CHAPLAIN (ROMAN CATHOLIC PRIEST), U. OF ROCH., ROCHESTER, NEW YORK 14627

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

The basic tenet of Roman Catholicism, in keeping with the life and message of Christ, is one of love. The primacy of love guides all action toward God or fellowmen. Various interpretations have always been formed on Roman Catholicism - with certain extreme held strongly by many. At the same time, the Vatican Council in its statement on the role of the Church in the Modern world condemns war and arms and appeal to fraternal love as a bond between all men. Pope Paul makes clear, almost daily, the peace witness of Christ and His Church.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than religious, political, or labor organizations.

I was a member of the boy scouts for four or five years.

I am a member - and present Vice President of the Newman Club of the University of Rochester.

Over a longer period I have belonged and took part in a large number of religious discussion groups, conferences, Choirs etc.

Series V.—REFERENCES

INSTRUCTIONS.—This series must be completed. If more space is needed use extra sheets of paper.

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed conscientious objection to participation in war.

Name	Full Address	Occupation or Position	Relationship to You
Rev. Msgr. Robert F. Taylor	291 Jay St. Pulaski, N.Y.	Eastman Kodak Co.	Friends
Francis O'Gara	St. Joseph's Seminary, Yonkers, N.Y. 10704	Seminarian	Friend
Brother David Rast, OSB.	Mount Saviour, Pine City, N.Y. 14871	Monk	Friend
Rev. Sidney Wilkin	42 Huntington Pl. Rochester, N.Y.	—	Friend
V. Rev. James E. Reg	529 W 121 NYC 10027	Priest	Friend & Advisor

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—Every registrant claiming to be a conscientious objector shall make this certificate. If the registrant cannot read, the items and his replies thereto shall be read to him by the person who assists him in completing this form. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, VINCENT F. McGEE JR., certify that I am the registrant named and described in the foregoing statements in this form; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing ARE (are, are not) in my own handwriting.

Registrant sign here ☞ Vincent F McGee Jr.
(Signature or mark of registrant)

February 24, 1966
(Date)

(Signature of witness to mark of registrant)

(Date)

(Signature of witness to mark of registrant)

(Date)

Be it clearly noted that I waive no rights in respect to amplification of statements herein made and that I intend to submit such amplification in short order. I am aware of the requirements of the Selective Service in regard to time but request one week's time for submission of such longer statement of my belief concerning claim to conscientious objection herein made. Vincent F McGee Jr.

If another person has assisted the registrant in completing this form, such person shall sign the following statement:

I have assisted the registrant herein named in completing this form because

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

(Date)

(4) U.S. GOVERNMENT PRINTING OFFICE

Government's Exhibit 25

Letter dated April 26, 1967 from New York City Selective Service Headquarters enclosing defendant's letter to President

[See Opposite]

LOCAL BOARD NO. 15

APR 27 1967

321 West 44th Street
New York 36, N. Y.

NEW YORK CITY HEADQUARTERS
SELECTIVE SERVICE SYSTEM
205 EAST 42ND STREET
NEW YORK, N.Y. 10017

TO: Local Board 15 DATE: April 26, 1967

FROM: Chief, Legal Division FILE REF: 34:slr

SUBJECT(S): MCGEE, Vincent Francis
SS No.: 50 15 43 359

1. We are submitting herewith for appropriate disposition the enclosure(s) checked below pertaining to the subject individual(s):

( ) Cover Sheet (SSS Form No. 101) and contents
( ) Registration Card (SSS Form No. 1)
( ) Registration Certificate (SSS Form No. 2)
( ) Registration Questionnaire - Foreign (SSS Form No. 50)
( ) Classification Questionnaire (SSS Form No. 100)
( ) Verification of Criminal Record
( ) DD Forms 47, 62 and SF Forms 88,89 (Medical Registrant)
( ) Application for Change of Name (SSS-NYC Form 81)
( ) Recommendation of Scientific Advisory Committee of

2. Remarks: We are enclosing for the Local Board's information a copy of a letter which is self-explanatory dated April 15, 1967, from the registrant to the President.

Our National Headquarters has advised the Department of Justice regarding the mutilation of his Classification Card and his Registration Card as indicated in their letters to the registrant, copy of which is enclosed.

Any action that the Justice Department may bring about does not preclude the Local Board from reconsidering his classification for I-A, I-O, I-A-O etc, which he may be eligible for upon his graduation from college as he indicates in his letter is now approaching.

However, pursuant to 1642.4 it seems that the Local Board may now give consideration to declaring him delinquent for his failure to have in his possession his Registration Certificate (SSS Form 2). See Section 1617.1.

( ) Please acknowledge receipt on attached copy and return (If not checked "X", no receipt required).

FOR THE NEW YORK CITY DIRECTOR

Thomas R. Maher

THOMAS R. MAHER
Captain, AGC
Chief, Legal Division

SSS-NY City
Form No. 90
(January 1965)

99a

555

VINCENT P. McGEE, JR.

Con: Vietnam –
Eustace burned draft card –

P.O. Box 5642
The University of Rochester
Rochester, New York 14627
April 15, 1967

To the President of the United States of America

Dear Sir:

Enclosed you will find the remnants of that piece of paper symbolic of my tacit approval and consent to the military program of these United States of America.

Over one year ago, I petitioned my local draft board for classification as a conscientious objector to war and the use of arms or any form of violence in the conduct of human affairs. Action in my petition has been withheld on account of my present status as a student. To a degree not common as far as this status is concerned I have earned the student deferment through full-time employment while doing simultaneous full-time study and going deeply into personal debt. Beyond the present I have already been accepted for graduate study in a program where I would probably qualify for the theological deferment.

Thus, I feel as 'safe' as one could be from the fear of being drafted. Since my home is in an area of New York City where few are fortunate enough to get to College it is doubtful if I would ever in fact be drafted. However, my basic conviction is that life demands building and never destruction. Peace and freedom are to be won, but never with the force of violence.

The actuality of this country's activity around the world and especially in Vietnam has brought ever clearer into my convictions the fundamental belief that man must build and not destroy, love and not hate.

I am very much aware of the consequences of the deed done today, but find no other way in which to effectively protest what seems to be the decision of our government concerning the future. I cannot participate in this evil and must cry

100a

out against it.

In the name of all we hold dear, Mr. President, stop this destruction and violence.

Do not let this country follow others down the path of attempted world domination. I for one refuse to follow those who saw but were quiet in Germany before the Wars.

I chose to follow the words of the Pope at the United Nations, "War, never again." The only effective way to ensure this that I can see for myself personally is to sever every link with violence and war. Thus the symbolic destruction of a draft card, and non-cooperation with the military-industrial complex which seems to be dictating our international policy.

Respectfully submitted,

Vincent F. McGee, Jr.

The President of the United States
the White House
Washington, D.C.

Government's Exhibit 30

Current Information Questionnaire
(SSS Form 127)

[See Opposite]

Selective Service System
LOCAL BOARD No. 15
321 West 44th Street
New York, N.Y. 10036

(Local Board Stamp)

Selective Service System
LOCAL BOARD QUESTIONNAIRE RETURNED
JUL 27 1967
321 West 44th Street
New York, N.Y. 10036

Govt. Ex. 30

O:
Mr. Vincent Francis McGee, Jr.

Selective Service No.	Date of birth	Class
50 15 43 359	August 18 (Month) (Day)	2S

Date of Mailing July 3, 1967

COMPLETE AND RETURN BEFORE July 13, 1967

The law requires you to fill out and return this questionnaire on or before the date shown to the right above in order that your local board will have current information to enable it to classify you. When the questions in any series do not apply, enter "DOES NOT APPLY", or "NONE". You may attach any additional information you believe should be brought to the attention of the local board. After completing the statements be sure to date the form and sign your name. FILL OUT WITH TYPEWRITER, OR PRINT IN INK.

C. Kaplan
(Member or Clerk of Local Board)

STATEMENTS OF THE REGISTRANT

CONFIDENTIAL AS PRESCRIBED IN THE SELECTIVE SERVICE REGULATIONS

SERIES I.—MAILING ADDRESS

1. Name(s) and address(es) of persons(s) other than a member of your household who will always know your address _____

2. My current mailing address is _____
(ZIP code)

3. My telephone number (home or business) is _____

SERIES II.—MARITAL STATUS AND DEPENDENTS

1. (a) I (Check one) ☐ HAVE NEVER BEEN MARRIED ☐ AM A WIDOWER ☐ AM MARRIED ☐ AM DIVORCED

(b) I (Check one) ☐ DO ☐ DO NOT live with my wife; if not, her address is _____

(c) We were married at _____ (Place) on _____ (Date)

2. (a) I have the following children under 18 years of age who live with me in my home:
Name _____ Age _____ Name _____ Age _____
Name _____ Age _____ Name _____ Age _____

(b) If you have no child other than an unborn child, attach a statement from a physician showing the basis for his diagnosis of pregnancy and the expected date of birth.

3. I (Check one) ☐ DO ☐ DO NOT have dependents other than those listed above.

SERIES III.—MILITARY RECORD

1. If you are now on or have been separated from active military service enter (a) Armed Force _____
(b) Service number _____ (c) Date of entry _____
(d) Date of separation _____ (e) Type of separation _____

2. If you are now a member of a reserve component (including the National Guard) give (a) Name and address of unit _____
(b) Service number _____ (c) Date of enlistment, transfer, or appointment _____

3. If you are now a member of a Reserve Officer Training Corps or any other officer procurement program describe fully _____

SSS FORM NO. 127 (Revised 10-15-65)
(Previous printings may be used)

(CONTINUED ON REVERSE SIDE)

102a

1. I am now employed as a (give full title: for example, bricklayer, farmer, teacher, auto mechanic, steel worker. If not employed, so state) _____

2. I do the following kind of work. (Give a brief statement of your duties. Be specific) _____

3. My employer is _____
(Name of organization or proprietor, not foreman or supervisor; enter "Self" if self-employed)

_____
(Address of place of employment—Street, or R.F.D. Route, City, and State)

whose business is _____
(Nature of business, service rendered, or chief product)

4. I have been employed by my present employer since _____
(Month and year)

5. Other occupational qualifications, including hobbies, I possess are _____

6. I speak fluently the following foreign languages or dialects _____

7. I read and write well the following foreign languages or dialects _____

SERIES V.—EDUCATION

1. Grade or year completed (Line through all grades or years successfully completed) (Exclude trade or business schools)	Elementary and High School												College				Post Graduate				
	None	1	2	3	4	5	6	7	8	9	10	11	12	1	2	3	4	1	2	3	4	5

2. (a) I have completed ____ years of college, majoring in _____
at _____ and (check one) ☐ HAVE ☐ HAVE NOT
(Name and address of institution)
received a degree.

(b) I have received the degree(s) of _____

3. (a) I am a full-time student in (check one) ☐ High School ☐ College ☐ Business School
☐ Trade School _____
(Name and address of institution)
majoring in _____ preparing for _____
(Occupation or profession)
and expect to (check one) ☐ receive a degree ☐ finish course on _____
(Date)

(b) I will be a full-time student next semester at _____

SERIES VI.—COURT RECORD

1. If you have been convicted or adjudicated of a crime or crimes other than minor traffic violations complete this series. If none enter "NONE."

Offense (other than minor traffic violations)	Date of Conviction (Month, Day, Year)	Court (Name and Location)	Sentence

2. I (Check one) ☐ AM ☐ AM NOT now being retained in the custody of a court of criminal jurisdiction, or other civil authority. Specify _____
(Awaiting trial, on parole, etc.)

SERIES VII.—PHYSICAL CONDITION

1. If you were ever rejected for service in the Armed Forces state (a) when _____
(b) where _____

2. If you have any physical or mental condition which, in your opinion, will disqualify you for service in the Armed Forces, state the condition and attach a physicians' statement if not previously submitted.

_____

3. If you have ever been an inmate or a patient in a mental or tuberculosis hospital or institution, give the name and address of each _____

_____

SERIES VIII.—SOLE SURVIVING SON

I (Check one) ☐ AM ☐ AM NOT the sole surviving son of a family of which the father or one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service.

_____ _____
(Date) (Registrant's signature)

NOTICE.—Imprisonment for not more than 5 years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification.

U.S. GOVERNMENT PRINTING OFFICE: 1965 O—701-066

JUL 25 1967

321 West 44th Street
New York, N.Y. 10036

501 West 122nd Street
New York, New York 10027
July 23, 1967

Selective Service System
Local Board No. 15
321 West 44th Street
New York, New York 10036

Dear Sirs:

I have received SSS form # 127 mailed by your office on July 3rd and forwarded here by my family. As I explained by postal I have been on the road returning from the West Coast and this is the first opportunity I have had to attend to your questionnaire.

My receipt of your form SSS-N.Y. City # 59, dated May 19, 1967 clearly indicates (even though it is mimeographed form designed to answer numerous uses) that you are aware of my recent decision that I could no longer cooperate with the Selective Serivce System in any way because it is my considered decision that such cooperation is equal to tacit consent to the violence connected with the military program of The United States. No doubt this form letter was sent upon your receipt of a copy of the letter sent on April 25, 1967, by Mr. Daniel O. Omer, General Council of the National Headquarters of the Selective Service System. No doubt, also, you have a copy of my letter to the president dated April 15th, 1967.

I hereby return form # 127 as received and wish to tell you that further correspondence from your office will simply be returned unopened, consistent with my belief that cooperation is approval of actions and policy which in conscience I can have nothibg to do with.

It is my conviction that I do not aviod or dodge any obilgation as a citizen of the United States, but on the contrary accept the obligation of patriotic confrontation with a system and program which I feel is beyond the high ideals of the United States and my personal conscientious committment as a human being and as a Christian.

Sincerely yours,

Vincent F. McGee, Jr.

vm/
encl.

104a

Government's Exhibit 33

Order to Report for Physical Examination
(SSS Form 223)

[See Opposite]

SELECTIVE SERVICE SYSTEM — Approval Not Required.

ORDER TO REPORT FOR ARMED FORCES PHYSICAL EXAMINATION

Selective Service System
LOCAL BOARD NO. 15
321 West 44th Street
New York, N. Y. 10036
(LOCAL BOARD STAMP)

To Mr. Vincent Francis McGee
P.O. Box 5642 River Campus Station
Rochester, New York

October 4, 1967
(Date of mailing)

SELECTIVE SERVICE NO.			
50	15	43	359

You are hereby directed to present yourself for Armed Forces Physical Examination by reporting at:

ARMED FORCES EXAMINING STATION 39, WHITEHALL STREET, N.Y.C. Room 202
(Place of reporting)

on October 18, 1967 (Date) at 7:00 A.M. (Hour)

O. Kaplan
(Member or clerk of Local Board)

IMPORTANT NOTICE

(Read Each Paragraph Carefully)

TO ALL REGISTRANTS:

When you report pursuant to this order you will be forwarded to an Armed Forces Examining Station where it will be determined whether you are qualified for military service under current standards. Upon completion of your examination, you will be returned to the place of reporting designated above. It is possible that you may be retained at the Examining Station for more than 1 day for the purpose of further testing or for medical consultation. You will be furnished transportation, and meals and lodging when necessary, from the place of reporting designated above to the Examining Station and return. Following your examination your local board will mail you a statement issued by the commanding officer of the station showing whether you are qualified for military service under current standards.

If you are employed, you should inform your employer of this order and that the examination is merely to determine whether you are qualified for military service. To protect your right to return to your job, you must report for work as soon as possible after the completion of your examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

If you are so far from your own Local Board that reporting in compliance with this Order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this Order and go immediately to that Local Board and make written request for transfer for examination.

TO CLASS I-A AND I-A-O REGISTRANTS:

If you fail to report for examination as directed, you may be declared delinquent and ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

TO CLASS I-O REGISTRANTS:

This examination is given for the purpose of determining whether you are qualified for military service. If you are found qualified, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service.

SSS Form 223 (Revised 11-12-65) (Previous printings may be used until exhausted.) U.S. GOVERNMENT PRINTING OFFICE

EXHIBIT G.

Government's Exhibit 38

Letter dated January 29, 1968 from
Robert E. Gamache to Local Board

[See Opposite]

DEPARTMENT OF THE ARMY
ARMED FORCES EXAMINING AND ENTRANCE STATION
39 Whitehall Street, New York, New York 10004

BCD-EQ 29 January 1968

SUBJECT: Refusal of Induction (MC GEE, Vincent Jr., Francis)

TO: United States Attorney
Southern District of New York
U.S. Court House, Foley Square
New York, New York

1. Vincent Francis Mc Gee Jr, SSVC 50 15 43 359, 600 West 122nd Street, New York, New York, Room 515, Selective Service Registrant from Local Board No. 15, 321 West 44th Street, New York, New York, appeared at this station on 29 January 1968 to be inducted into the Army of the United States in accordance with the Military Selective Service Act of 1967, and found fully qualified for induction.

2. Mr. Mc Gee, a registrant for induction refused to take one step forward when his name was called by the Induction Officer, Major Robert M. Schmid, 075083. He was then informed that his refusal constituted a felony under the provisions of the Military Selective Service Act of 1967, and that conviction of such an offense under the provisions of civil proceedings would lsubject him to be punished by imprisonment for not more than five (5) years or a fine of not more than $10,000.00 or both. He was then informed again of the imminence of his induction under the specific language and his name was called by the Induction Officer. Mr. Mc Gee persisted in his refusal to be inducted and did not take one step forward. Registrant bases his refusal on his moral and religious beliefs. The refusal was witnessed by SP4 Robert Lunceford, RA 14964792 and SP4 Jose F. Ramirez, RA 12735552, now stationed at AFEES, 39 Whitehall Street, New York, New York.

3. Mr. Mc Gee did not desire to write and sign his own deposition.

FOR THE COMMANDER:

ROBERT E. CAMACHE
1st Lt, AGC
Asst Adjutant

cc: Dir of SS (City)
LB No, 15
Mr. Lebron
File

Selective Service System
LOCAL BOARD No. 15
JAN 31 1968
321 West 44th Street
New York, N.Y. 10036

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Government's Exhibit 39

Delinquent Registrant Report
(SSS Form 301)

[See Opposite]

SELECTIVE SERVICE SYSTEM

Budget Bureau Approval not required.

DELINQUENT REGISTRANT REPORT

Selective Service System
LOCAL BOARD NO. 15
321 West 44th Street
New York, N. Y. 10036
(Local Board Stamp)

January 31, 1968
(Date)

TO: Hon. Robert M. Morgenthau, United States Attorney.
U.S. COURT HOUSE, FOLEY SQUARE, NEW YORK, N.Y.
(Address)

1. IDENTIFICATION OF DELINQUENT:

Full name of delinquent:			Alias, if any:
MC GEE (Last)	VINCENT (First)	FRANCIS (Middle)	None

Last known address:	Last known telephone No.:
P.O. Box 5642 River Campus Station, Rochester New York (Number and street or R. F. D. route; City, town, or village; County; State; Zip Code)	MS 6-2676

Selective Service No.:	Social Security No.:	Selective Service classification:
50 15 43 359	124 32 9921	1-A

Color of eyes:	Color of hair:	Height:	Weight:	Other obvious physical characteristics:
Blue	brown	5/11"	152	Forehead & Birthmark center chest

Date of birth:			Place of birth:	
August (Month)	18 (Day)	1943 (Year)	Ayre (City, town, county)	MASS. (State or country)

Prior military service:

None (Armed Force)	(Service number)	(Date of entry)
(Name of last organization)		(Date of separation)

This delinquent has a court record as follows:

Offense	Date of Conviction (Month, day, year)	Court (Name and location)	Sentence
None			

2. OFFENSES:

This delinquent (check applicable box) ☐ failed to report for induction ☒ reported for induction but failed or refused to submit to induction into the Armed Forces pursuant to (check applicable box):

☒ Order to Report for Induction (SSS Form 252).
☐ Order for Transferred Man to Report for Induction (SSS Form 253).

The order indicated was mailed on January 12, 1968 (Date of mailing) to this delinquent at c/o 501 West 122nd St. N.Y.
P.O. Box 5642, Riv. Campus Sta. Rochester, N.Y. (Address) to report on Jan. 29, 1968 (Date)

In addition to failing to report for induction into the Armed Forces this delinquent has also failed to perform the following duties at the times indicated:

DUTIES	DATES
Failed to report Preinduction	Oct. 18, 1967

SSS Form 301 (Revised 10-6-64)

(OVER)

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3. EFFORTS MADE TO LOCATE DELINQUENT:

The delinquent has (Has, has not) been located on ..... (Date) at P.O. BOX 5642 River Campus Sta. Rochester, N (Address)

The person who will always know the delinquent's address is Miss Margaret Collins

501 W. 122nd St. N.Y. (Address) . This person has not (Has, has not) been contacted by

X X X (Letter, telephone, in person) on See Remarks (Date) with the following result .....

The delinquent's last known place of employment or business is Unemployed (Name)

..... (Address), ... (Telephone number). His employer ..... (Has, has not) been contacted by

..... (Letter, telephone, in person) on ..... (Date) with the following result .....

4. Mail directed to the delinquent Is (Is, is not) returned by the post office.

* INDUCTION ORDER NOT ISSUED

5. REMARKS: (Include additional efforts to locate delinquent or names of individuals who may know whereabouts of the delinquent.)

* File reviewed in light of Local Board Memorandum 14, Para. 9. New York City Director has authorized that the named registrant be reported for prosecution for Failure to Submit to Induction and his failure to maintain his current SSS Classification Card (SSS Form 110) issued in September 1967 placing him in Class 1-A.

Date of Registration: Sept. 7, 1961
Place: Man Group B, NYC

RECEIVED
SELECTIVE SERVICE SYSTEM
NEW YORK CITY HEADQUARTERS
FEB 1 1968
[illegible] 42nd Road

6. FUTURE INFORMATION:

You will be advised promptly by letter of any change in this delinquent's status and of any additional facts which may come to the attention of this board concerning his whereabouts or which may aid you in apprehending and prosecuting him.

B. J. [illegible]
(Member or clerk of local board)

This form shall be used to report to the United States Attorney those delinquents who fail to report for induction or who fail or refuse to submit to induction. Other deliquencies, if reported to the United States Attorney, shall be reported by letter.

This form shall be made out in quadruplicate. The original and two copies are forwarded to the State Director of Selective Service, who shall transmit the original and one copy to the United States Attorney for the judicial district in which the local board is located and retain one copy. One copy of the form shall be filed in the Cover Sheet (SSS Form 101) of the delinquent.

SP O 88 2-364

108a

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 177—September Term, 1969.

(Argued September 30, 1969 Decided March 31, 1970.)

Docket No. 33568

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT FRANCIS McGEE, JR.,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and FEINBERG,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge,* convicting appellant, after a verdict, on a four-count indictment for violating 50 U.S.C. App. §462(a). Affirmed.

ALAN H. LEVINE, New York, N. Y. (Marvin M. Karpatkin, J. Edward Meyer, III, on the brief), *for Defendant-Appellant.*

ROSS SANDLER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, James D. Zirin, Assistant United States Attorney, on the brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Vincent Francis McGee, Jr. appeals from a judgment of conviction for violating 50 U.S.C. App. §462(a), following a trial before Judge Murphy and a jury in the District Court for the Southern District of New York. McGee was convicted on all four counts of the indictment and was sentenced to imprisonment for two years on each count, the terms to run concurrently. The indictment charged him with refusing to submit to induction (Count 1), to report for a physical examination (Count 2), to possess a valid notice of classification (Count 3), and to submit information that his local board had requested (Count 4).

I.

McGee is a Roman Catholic who is currently a student at the Union Theological Seminary in New York City. He registered with Local Board 15 in Manhattan in August 1961, and informed the board a month later that he was "a student preparing for the ministry at the Cathedral College of St. Joseph's Seminary . . . under the direction of Roman Catholic Church." He took a leave of absence from the College in 1963, during which period his board classified him I-A. In August 1964, he passed the pre-induction physical that his board had ordered. A short time later, after enrolling in the University of Rochester, he was granted a II-S (student) deferment. He was temporarily reclassified I-A in September 1965, but his II-S classification was renewed shortly thereafter. In February 1966, while still classified II-S, McGee requested conscientious objector status, stating that it was his "intention to continue on to actual ordained Priesthood." The clerk of his board wrote him on March 23:

> This will advise that the recent evidence submitted, concerning your case has been reviewed by the Local Board. It is the decision of the Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.
>
> However, we wish to advise that your claim as Conscientious Objector will be considered when you no longer qualify for a student classification.

McGee did not appeal this decision; he later requested and was granted a further II-S classification in October 1966.

In April 1967, while still classified II-S and enrolled in the University of Rochester, McGee wrote President Johnson, enclosing remnants of his torn and burnt draft card. This letter stated that even though he had "already been accepted for graduate study in a program where" he "would probably qualify for the theological deferment," he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy." McGee's local board received a copy of this letter, apparently considered reopening his classification and decided against it, and, in any event, did not change his II-S classification and deferment. Following McGee's graduation from the University of Rochester in June 1967, his board sent him a Current Information Questionnaire. McGee returned it unanswered, and in a covering letter announced that "further correspondence" from the draft board would "simply be returned unopened," consistent with his belief that "cooperation is approval." On September 19, 1967, almost two months after receipt of this letter by the local board, McGee was reclassified I-A. The Board mailed him a notice of classification and a letter clearly informing him that he had a right to ask for a per-

sonal appearance or an appeal within 30 days, that the board had a Government Appeal Agent to aid him "with a personal appearance, an appeal, or any other procedural right," and that the Appeal Agent or his representative would give him legal counsel on Selective Service matters at no charge. McGee returned this unopened, writing on the envelope

> Returned pursuant to previous
> declaration and notification.

McGee also returned unopened an order directing him to appear for a physical examination scheduled for October 18, 1967, and did not appear for it. He returned a delinquency notice sent on November 22, 1967. McGee did open his induction notice, which was sent on January 11, 1968, and did report for and pass a physical examination at the induction center. However, he refused to submit to induction.

Meanwhile, McGee had matriculated in the Union Theological Seminary as a full-time student on September 27, 1967. At no time did he request a IV-D (student for the ministry) classification from his draft board, but he claims that his letter to the President in April 1967, an interview with two FBI agents in May 1967, and testimony before a grand jury in November 1967, gave his board sufficient information to require classifying him IV-D. At trial, it was established that the Union Theological Seminary is non-denominational, and that McGee's parish priest recommended him to the Seminary. The chairman of McGee's draft board testified outside the presence of the jury that before McGee was classified I-A in September 1967, all pertinent information in his Selective Service file was reviewed. Judge Murphy found that the board considered and rejected appellant's conscientious objector claim.

McGee argues that his local board acted unlawfully in classifying him I-A in September 1967, when in his view he should have been classified IV-D or I-O. On that premise he claims that he cannot be convicted of refusing to submit to induction (Count 1) because his order to report for induction was illegal; that he cannot be convicted of refusing to report for a physical examination (Count 2) because if he had been properly classified, he would not have been called for a physical or, if called, could have waived the examination without penalty; and that he cannot be convicted of failing to possess a valid notice of classification (Count 3) because his I-A classification was invalid. He also argues that he cannot be convicted of failure to supply information to his local board (Count 4) because he substantially complied with its request and because any information not supplied was favorable to him.

II.

We shall deal first with McGee's claim that he was entitled to exemption from military service as a matter of law under 50 U.S.C. App. §456(g), which provides that:

> [S]tudents preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service (but not from registration) under this title.

McGee contends that the statutory policy is so strong that the exemption may not be denied any registrant who meets the qualifications. He concedes that he did not request the exemption from his board, but claims that no such request

is required by the statute or regulations. In any event, he argues that the local board had sufficient knowledge of his qualification for the exemption to require its issuance.

It is true that section 456(g) is a mandatory provision in the sense that a draft board may not deny a IV-D exemption to one who qualifies for it. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968).[1] However, it does not follow that a registrant may totally disregard the administrative procedures established by the Selective Service System, and rely on his own evaluation of his right to a IV-D classification in the hope that a court will subsequently support his interpretation. While *McKart* v. *United States*, 395 U.S. 185, 195 (1969), states that "[i]n Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created," it recognizes that the exhaustion doctrine may well be applicable to IV-D claims like McGee's, where the registrant is relying on facts never clearly presented—or indeed presented at all—to his local board.

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1 McGee attempts to bring his case within *Oestereich*, *supra*, on the further ground that he was denied IV-D and classified I-A as punishment for burning his draft card, writing to President Johnson, and refusing to cooperate with his local board. Apart from any other considerations, the record simply does not establish this contention. McGee wrote to the President, enclosing remnants of his draft card, in April 1967. His local board received a copy of this letter on April 27. However, appellant was not classified I-A until September 19, 1967, when his II-S deferment expired following his graduation from the University of Rochester. This was almost five months after the board was informed of the letter to the President and almost two months after McGee announced his intention to return board correspondence unopened. These are hardly the actions of a draft board that is acting lawlessly. Moreover, *Oestereich* is further distinguishable because appellant there sought redress through the Selective Service System and was unjustifiably deprived of a IV-D exemption which he had already obtained. McGee never applied for a IV-D classification and it is impossible to perceive how the local board could have punitively deprived him of an exemption he had never requested.

> Of course, it is necessary that the local board, which has the responsibility of classifying registrants in the first instance, be given the information necessary to perform its function. However, the present case does not present an instance where a registrant is trying to challenge a classification on the basis of facts not presented to the local board. In such a case, the smooth functioning of the system may well require that challenges to classifications based upon facts not properly presented to the board be barred.

395 U.S. at 198 n. 15.

McKart dealt with the proper interpretation of the "sole surviving son" exemption, 50 U.S.C. App. §456(o), which the Court found to be only a question of statutory interpretation and "certainly not a matter of discretion." *Id.* at 198. Accordingly, it refused to apply the exhaustion doctrine in that case because there was "simply no overwhelming need" to have the Selective Service System "resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution." *Id.* at 199. McKart's claim was thus in sharp contrast to "classification questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards." *Id.* at 198. Thus,

> Conscientious objector claims . . . or deferments for those engaged in activities deemed "necessary to the maintenance of the national health, safety, or interest" . . . would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service System and the courts may have a stronger interest in having the

> question decided in the first instance by the local board and then by the appeal board, which considers the question anew.

Id. at 198 n. 16. In further distinguishing the earlier body of cases which did apply the exhaustion doctrine, the Court noted that:

> [T]hose cases all involved ministerial or conscientious objector claims, claims that may well have to be pursued through the administrative procedures provided by the Selective Service laws.

Id. at 201.

McGee's claim for a IV-D exemption here depended upon resolution of essentially factual issues which are by no means conceded. This distinguishes such cases as *McKart, supra,* where the facts were undisputed, and *Oestereich, supra,* where the board had already recognized the registrant's right to a IV-D classification.[2] Whatever the draft board's determination might have been had McGee applied to it for IV-D status and supplied it with full information, even the facts adduced *at trial,* as will be seen below, do not show that he was so clearly entitled to that exemption that the draft board could have arrived at but one conclusion. Accordingly, McGee's failure even to request a IV-D exemption from the local board or supply it with any supporting information is a sufficient ground for disposition of that claim.

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2 For other cases where the claim by a student to a IV-D classification raised factual issues, see *Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304, 316-17 (1946) (nature of the seminary, motives of the registrant); *United States* v. *Bartelt,* 200 F.2d 385 (7 Cir. 1952) (whether registrant was full-time divinity student); *United States ex rel. Levy* v. *Cain,* 149 F.2d 338 (2 Cir. 1945) (nature of seminary and studies, registrant's intentions).

Beyond that it is plain that denial of a IV-D exemption to McGee would have had a "basis in fact." Under section 456(g), at least two requirements must be satisfied before a divinity student becomes entitled to a IV-D exemption: He must be a student preparing for the ministry under the direction of a recognized church or religious organization; and he must be satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school. As to the latter, it is clear that at the time McGee refused induction[3] he was a matriculated student at the Union Theological Seminary who was satisfactorily pursuing a full-time course of study. What is in dispute, however, is whether McGee was preparing for the ministry under the *direction* of a recognized church or religious organization. There is evidence in the record that McGee is a Catholic and that he intends ultimately to become a priest, but the evidence that he was studying under the direction of the Catholic Church when he refused induction is slim. His parish priest testified that he had recommended McGee to the Seminary, but that could have meant no more than that he thought McGee to be a serious and decent young man. The priest did not say he was in any way supervising McGee's course of study. According to the record, the divinity school in which McGee enrolled is non-denominational and may contain many students who have not formulated the intention of entering the ministry and are not under the direction of any church or religious organization. The record discloses that at least some of the Catholic students at the school come from Catholic seminaries to take courses there, but McGee did not. Indeed, McGee apparently had been a student at such a

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3 . We assume only for purposes of discussion that this is the key date, rather than some earlier time, e.g., date of reclassification by the board.

Catholic seminary, but left to go to Hunter College and then the University of Rochester, where he received a Bachelor of Science degree.[4] Accordingly, McGee's local board would not have had to conclude that he was "preparing for the ministry under the direction of" the Catholic Church. Perhaps the board would have granted the exemption had McGee made the claim directly to it; perhaps it would not. But we cannot say that if it had followed the latter course, there would have been "no basis in fact" for its action.[5]

III.

In contrast to his inaction with respect to the IV-D claim, McGee had squarely placed his I-O application before the local board when he requested and completed the Special Form for Conscientious Objector in February 1966.[6]

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4 While at the University of Rochester, McGee took some courses at Colgate Rochester Divinity School.

5 McGee claims that the trial judge incorrectly read into the statute a requirement that the divinity school itself be under the direction of a recognized church or religious organization in order that its students can qualify for a IV-D exemption. Such an interpretation of the statute would indeed be wrong since it is the student, not the school, to whom that language applies. However, we do not believe the trial judge thus misinterpreted section 456(g). Having found, correctly, that Union Theological Seminary is "a non-denominational seminary," he did not treat this as dispositive of the IV-D claim, but rather refused to treat proof of full-time attendance at a recognized non-denominational divinity school as alone supplying the other prerequisite for the exemption. In other words the finding indicated only that since Union Theological Seminary was non-denominational, the nature of the school could not of itself supply the missing element of "direction," as, for example, might be the case for a denominational seminary. We agree with that conclusion. *Cf. Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 310, 316-17 (1946); *United States ex rel. Levy* v. *Cain*, 149 F.2d 338, 341 (2 Cir. 1945).

6 While McGee never protested the draft board's action, neither did he ever withdraw the application. The Government makes a fleeting argument that McGee "no longer desired a I-O deferment." If by this

He contends that there was no basis in fact for denying his conscientious objector claim and that his reclassification as I-A was thus unlawful.

We would be inclined to accept the first step in McGee's argument. In his Form 150 he expressed his belief "in a personal Supreme Being to whom obligation is superior when duties of human relations are considered," and said that "taking part in any form of military operation indicates an approval/consent situation repugnant . . . to love and service of God and fellow man." These and other statements, if sincere, established that he, "by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. §456(j). Neither his prior nor his subsequent actions were inconsistent with his assertions, see *United States* v. *Haughton*, 413 F.2d 736, 742 (9 Cir. 1969), and we see nothing in McGee's file—all that was before the board—that could reasonably put his sincerity in issue. This is particularly significant in light of the board chairman's testimony that McGee's local board did not require an interview for conscientious objector applicants, although it undoubtedly could have.[7]

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is meant that McGee had withdrawn his request for I-O, it is incorrect, as the Board was never so notified. Selective Service procedures then and now in force make clear that such a claim would have had to be withdrawn in writing. Local Board Memorandum No. 41, as amended, August 15, 1952, reported in Selective Service Law Reporter ("S.S.L.R.") 2174 (including amendments of July 30, 1968, which are not here relevant). Moreover, McGee's letter to his board, dated July 23, 1967, in which he announced his policy of non-cooperation, restates his "personal conscientious commitment."

7 The Selective Service System currently advises a local board that if it determines that it cannot grant the I-A-O or I-O classification claimed, the local board should invite or request the registrant to meet with it for an interview prior to classification. The primary purpose of the interview will be to develop further facts on which the conscientious objector claim is based, and the sincerity of such

While in this case we have the benefit of the testimony of the chairman of the local board, that does not reveal any "basis in fact" for denying McGee's application. As indicated, the statement of beliefs in his Form 150 would seem to meet the statutory test, and what little testimony there is by the board chairman concerning McGee's sincerity would, if anything, support a conclusion that the local board thought McGee was sincere. He testified that McGee "had been offered an alternative to the deferment he sought, which was a 1-O, hospital service. He did not choose to avail himself of that." He further testified that "[t]here was a letter written . . . where we were advised that the young man would not accept a 1-O or inferred that he wouldn't." This testimony was inaccurate. The letter referred to was by John A. Murray, dated February 1966; far from indicating that McGee would not accept a I-O, it was in support of his application.[8]

Acceptance of so much of McGee's argument still does not lead to his conclusion unless he is to be excused from failure to appeal his I-A classification. We see no reason for doing so. To the passages from *McKart* already quoted, we add another, 395 U.S. at 200:

> [T]oday's holding does not apply to every registrant who fails to take advantage of the administrative

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claim. This interview does not take the place of the personal appearance which the registrant may request under Section 1624.1, after the classification action.

Local Board Memorandum No. 41, as amended July 30, 1968, *supra* note 6.

8 What the chairman of the board may have meant was that McGee's application for I-O indicated that even if he were granted such a I-O, he would not report for alternative civilian service, as required under the Act. However, this eventuality never came to pass. In any event, on this record we would not regard McGee's statement that he would not accept alternate service as a "basis in fact" for denying a I-O classification.

remedies provided by the Selective Service System. For, as we have said, many classifications require exercise of discretion or application of expertise; in these cases, it may be proper to require a registrant to carry his case through the administrative process before he comes into court.

Mr. Justice Marshall listed four factors that ordinarily justify application of the exhaustion doctrine to bar a defendant from challenging a local board's classification: (1) "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"; (2) judicial efficiency may be furthered because a "complaining party may be successful in vindicating his rights in the administrative process"; (3) notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors"; and (4) "it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." 395 U.S. at 194-95. All the last three factors are present here. An appeal might well have led to McGee's obtaining a I-O classification and have avoided the judicial—and prosecutorial—effort that his flouting of the processes of the Selective Service System has caused. The System should have been given an opportunity to correct the error of the local board. And sanctioning McGee's deliberate refusal to avail himself of procedures which the Government had made available to him would encourage others to do so, especially in cases where the chances of success in court seem good.

On all this we find ourselves in agreement with the sensitive opinion of Judge Goodrich and in disagreement

with the able dissent of Judge Maris in a case strikingly similar to McGee's, *United States* v. *Palmer*, 223 F.2d 893 (3 Cir.), *cert. denied*, 350 U.S. 873 (1955). We agree also with the decision of another court of appeals, made in the light of *McKart*, which refused to excuse failure to appeal the revocation of a hardship deferment, *United States* v. *Powers*, 413 F.2d 834 (1 Cir. 1969).[9] The entire subject has just been exhaustively canvassed by the Ninth Circuit in *Lockhart* v. *United States*, decided December 18, 1969, 2 SSLR 3432, and we agree with Judge Ely's opinion for a majority of the court *in banc*. Moreover, the position taken by the two dissenting judges supports "forfeiture of judicial review" for failure to exhaust "when the registrant has deliberately sought to subvert and evade the administrative process," the situation here, as distinguished from a case where the "default was merely inadvertent or negligent."

Our brother Feinberg argues for a different result on the basis that the board "never passed on" the conscientious objector claim. We do not read the record that way. The board chairman, called as a defense witness at the trial in November 1968, said that when the McGee conscientious objector application was filed in 1966, he thought "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought" and that "what he set forth did not motivate me to grant him the relief he sought." He denied instructing the clerk to write that the conscientious objection claim had not been considered—a point on which the letter was ambiguous. He stated also that when the board gave McGee a I-A classification in 1967, "we again reviewed what appeared in the file," that

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9 So far as we have been able to determine, *United States* v. *McNeil*, 401 F.2d 527 (4 Cir. 1968), vacated and remanded for further consideration in the light of *McKart*, 395 U.S. 463 (1969), has not been again decided.

"we reviewed the record of the young man's case when we gave him the I-A and all pertinent information therein contained," and that "the board considered the whole file before it reclassified Mr. McGee I-A on September 19, 1967." While the chairman also testified that "based on our previous determination that his request for conscientious objection status was denied, we had no alternative at that time but to give him a I-A," we read this as meaning only that the chairman remembered the Board's dissatisfaction with McGee's showing when his application was examined in early 1966 and that the Board saw no reason to change their minds eighteen months later. Judge Murphy, who saw and heard the witness, found "as a fact that the draft board considered the defendant's application for a conscientious objector status and that was considered by the whole board on September 23." We do not see how this finding can be regarded as "clearly erroneous."

However, even if there had been an inadvertent failure to consider the conscientious objection claim in September 1967, as the dissent assumes, we would reach the same conclusion. This is precisely the kind of thing that a personal appearance or a conference with the Appeal Agent, which McGee was invited to have in the letter he returned unopened, would have been almost certain to reveal, with the result that the board would have passed on the merits of McGee's claim. Quite possibly it would have acted favorably; if it had not, the error would very likely have been corrected on appeal.[10] Despite their name, appeal boards do not perform simply a reviewing function. "It is universally held that the Appeal Board considers matters

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10 Communication between the appeal board and the local board could well have developed the true facts.

of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Local Board, and that any such prejudice on the local level is cured by a fair consideration on the appeal," *De Remer* v. *United States*, 340 F.2d 712, 719 (8 Cir. 1965) (citing cases). See 32 C.F.R. §1626.26; *McKart* v. *United States*, *supra*, 395 U.S. at 198 n. 16; *Storey* v. *United States*, 370 F.2d 255, 260 (9 Cir. 1966) (citing cases); *Clay* v. *United States*, 397 F.2d 901, 912-13 (5 Cir. 1968), *vacated and remanded on other grounds*, 394 U.S. 310 (1969); Note, *The Selective Service*, 76 Yale L.J. 160, 171 (1966). As already indicated, the fact that McGee had a good factual case for appeal in no way points against insistence on his taking one; a case of statutory construction like *McKart* differs since on such a matter there is a positive advantage in resort to the courts which alone can decide the issue authoritatively and uniformly for the benefit of all registrants. Instead McGee's stiff-necked refusal to have any dealings with the Selective Service System has caused the expenditure of countless hours by prosecutors, grand and petit jurors, and judges of the trial and appellate courts. If we were free to look at his case alone, we might still be tempted to take the charitable view of our dissenting brother. But if we should do that in McGee's case, we would be obliged to do it in every other similar one. Of course it seems "harsh" when the exhaustion requirement results in a conviction for refusal to submit to induction by a registrant with a seemingly good claim for exemption. But one of the main points of the exhaustion doctrine is to relieve the courts from having to consider claims that ought to be dealt with in the first instance by administrative agencies; it canot properly be limited to those persons whose claims would fail in court anyway.

While there are exceptions to the rule requiring a conscientious objector to appeal from a denial of his claim, none comes close to this case. Claimants are not required to exhaust administrative remedies in order to attack the constitutionality of the statute, *United States* v. *Sisson*, 294 F. Supp. 520 (D. Mass. 1968) (Wyzanski, *J.*), *probable jurisdiction noted*, —— U.S. —— (1969), or the regulations, *United States* v. *Branigan*, 299 F. Supp. 225, 233-36 (S.D.N.Y. 1969) (Weinfeld, *J.*), on the sensible ground that since local and appeal boards have no authority to determine constitutional claims, exhaustion would be a useless formality. Another qualification to the appeal requirement relates to "exceptional and unusual circumstances *underlying the failure to appeal*," *Thompson* v. *United States*, 380 F.2d 86, 88 (10 Cir. 1967) (emphasis added). But that line of cases holds only that neglecting to appeal is not a bar to judicial review of classification if the registrant's failure was justified. Examples are *Donato* v. *United States*, 302 F.2d 468 (9 Cir. 1962) (registrant received notice of classification while away on firefighting duties; by the time he returned the period for appeal had lapsed); *Glover* v. *United States*, 286 F.2d 84 (8 Cir. 1961) (registrant had unsuccessfully appealed a prior classification; when he received his fifth notice of classification, an exact duplicate of the fourth, there was no reason to expect him to go through the process again in the absence of an explanation from the board for the new notice);[11] *Powers* v. *Powers*, 400 F.2d 438 (5 Cir. 1968) (registrant given misinformation by the secretary of the local board regarding right to appeal); *United States* v. *Harris*, 302 F. Supp. 1194 (D. Ore. 1968) (registrant not charged with knowl-

11 The language from the opinion quoted in the dissent must be read in this context.

edge of right to appeal since he had little education and read with difficulty). The "exceptional circumstances" doctrine was recently reaffirmed and perhaps extended in *United States* v. *Davis*, 413 F.2d 148 (4 Cir. 1969), which held that the local board's failure to advise the registrant of the availability of a government appeal agent excused him from exhaustion: "If an Appeal Agent does nothing more than advise a registrant that he may lose his right to contest his classification when he is criminally prosecuted in the district court by failure to administratively appeal, it would seem to be worthwhile." But that cannot avail McGee who had advised the local board in no uncertain terms that he would not read anything they sent him, and would not have appealed no matter what he was told. While McGee's motives for taking this attitude may have been of the highest, they do not excuse his failure to seek the relief which the law afforded him. To countenance this would needlessly multiply the already heavy burden that cases like his are imposing on the courts.

IV.

We therefore affirm McGee's conviction on Count 1 for refusing to submit to induction. Since his claims with respect to Counts 2 and 3 hinge on the alleged impropriety of his I-A classification, we affirm the convictions on these counts also, without any need to consider what the proper result would be if we had held the I-A classification invalid. In light of the concurrent sentences there is no need to consider the conviction under Count 4 under the circumstances here presented.

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I respectfully dissent.

The Supreme Court has recently told us that "it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh." *McKart* v. *United States*, 395 U.S. 185, 197 (1969). This case shows how harsh that concept can be, particularly when—as here—it is applied unnecessarily. The record shows that there was apparently no basis in fact for denying the conscientious objector claim of Vincent Francis McGee, Jr. (as to this, we all agree), McGee presented his claim in timely fashion to his local draft board, and that body never passed on the merits of the claim. Despite this, the doctrine of exhaustion of remedies, born in the placid area of administrative law, is invoked thereby consigning McGee to jail for two years. That is too "harsh" for me.

As the majority opinion points out, McGee did present his I-O claim in full to his local board in February 1966. Examination of the record compels the conclusion that McGee's local board did not at that or any other time consider his I-O application on the merits. The board refused to consider his initial application for I-O on the ground that he was then a student, and eighteen months later, in September 1967, refused to classify McGee I-O on the ground that his claim had already been rejected.

32 C.F.R. §1623.2 requires that "the registrant shall be classified in the lowest class for which he is determined to be eligible." Since II-S (student deferment) is a lower class than I-O according to the hierarchy set forth in that regulation, it would have been improper for the board to grant McGee a I-O so long as he held a II-S, which he unquestionably did at the time he first presented his I-O claim. Thus it is difficult to understand the majority's

contention that the local board's letter to McGee dated March 23, 1966 was "ambiguous" on whether the I-O claim had been considered on the merits at that time. McGee then held a II-S classification. Under the regulation, therefore, consideration of the merits of McGee's I-O claim would have been a fruitless task for the board since it would in any event have been obliged to leave his II-S status unchanged. The letter itself advised McGee that "your claim as Conscientious Objector will be considered when you no longer qualify for a student classification"—in light of the regulation, that seems a statement of reason which is plain enough for me. And if there were any ambiguity left, the testimony of the board chairman resolves it in favor of the conclusion that in February-March 1966, McGee's I-O claim was not considered on the merits. While the majority correctly points out that the chairman testified that when the application was first filed in 1966, "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought," and that "what he set forth did not motivate me to grant him the relief he sought," he also testified that he rejected the application "at that time . . . *because the young man was attending college* and in my judgment he rated a 2S qualification which we proceeded to give him." (Emphasis added.) Almost immediately thereafter the following interchange took place:

> Q. I believe you said before that it was because of his beliefs that you failed to grant him a CO?
>
> A. I did not say anything at all about his beliefs. You can refer to the record. I said in my opinion what he set forth did not motivate me to grant him the relief he sought.

Then came the following interchange between the government attorney and the board chairman (Mr. Lande):

Mr. Robinson: Your Honor, I think Mr. Lande has testified that Mr. McGee was a student at that time and therefore they gave him a 2S classification.

The Witness: I did state that.

In light of the regulation, the letter received by McGee, and the board chairman's own testimony, the conclusion seems inescapable that when McGee applied for I-O in 1966 his claim was properly not considered on the merits, but was denied because he held a II-S classification at that time.

The record also indicates quite clearly that when McGee was classified I-A in September 1967, his I-O application was rejected on the ground that it had previously been considered and rejected, notwithstanding the fact that the initial rejection was not on the merits. It is true, as the majority points out, that the trial judge found that the local board "considered the defendant's application for a conscientious objector status and that was considered by the whole board on September 23,*" and also true that the chairman testified that the board "reviewed the record of the young man's case when we gave him the 1A and all pertinent information therein contained." However, he also testified as to the nature of that review:

> The Witness: To the best of my recollection . . . at that time [September 1967] the registrant was no longer in school. *Based on our previous determination that his request for conscientious objection status was denied,* we had no alternative at that time but to give him a 1A, which we did.
>
> Q. You didn't consider the conscientious objector claim again because it had been denied previously?
>
> A. Yes— [Emphasis added.]

* Should be September 19, 1967 (A.42).

Thus it is clear that the basis for denying I-O status in September 1967 was the previous denial in February-March 1966 when the application was first submitted. And, as already noted, the record is even clearer that this initial consideration in February-March 1966 did not deal with the merits of the application or the nature or sincerity of McGee's beliefs, but was based on the fact that he was a student with a II-S classification, who was not, for that reason, eligible for I-O status. At no time did the board pass on the merits of McGee's claim, even though, as the trial judge found, the application was "considered" by the board in September 1967.

The majority takes the position that "the chairman remembered the Board's dissatisfaction with McGee's showing when his application was examined in early 1966 and that the Board saw no reason to change their minds eighteen months later." However, the chairman did not testify concerning such memory. As noted, he did testify: "I did not say anything at all about his beliefs." Such an evaluation of McGee's beliefs was not necessary in February 1966 because McGee was then ineligible for I-O because of his II-S. Moreover, the chairman's testimony made clear that he did not discuss McGee's case with other members of the board in February 1966. In any event, the record establishes that neither the chairman alone nor the entire board ever considered whether McGee's beliefs were those of a sincere conscientious objector to war.

Such a failure to consider McGee's claim on the merits was a clear error by the local board, which one would think requires setting aside an order for induction. The board's failure was not only a blunder, but it also violated a selective service regulation, which commands it "to receive *and consider* all information, pertinent to the classification of a

registrant, presented to it," 32 C.F.R. §1622.1 (emphasis added), and undoubtedly violated the statute as well. E.g., 50 U.S.C. App. 455(a)(1):

> The selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe . . . .

Yet, we are told that the board's order should not be invalidated because McGee failed to utilize appellate remedies within the Selective Service System. I do not agree that we are required to invoke the doctrine of exhaustion in this case. It is true that *McKart, supra,* contains strong indications, quoted by the majority, that even the limited failure to exhaust present here may sometimes be fatal. But I do not read that case as necessarily and invariably preventing the defense of invalid classification when the registrant did give all the facts to the local board, especially where the record indicates that the local board applied no "expertise" in its ultimate decision and actually did not consider the classification on the merits at all. Compare *McKart, supra,* 395 U.S. at 198 n. 16. The language of *Glover* v. *United States,* 286 F.2d 84, 90-91 (8th Cir. 1961), may appropriately be applied to McGee's I-O claim:

> We adhere to the general rule as to the necessity for exhaustion of administrative remedies in order to obtain a judicial review, and are of the opinion that such rule is generally applicable and usually necessary. However, we are of the view that such general rule is not absolute, inflexible and without exception, but that it is to be relaxed only under extremely exceptional and unusual circumstances. The factual situa-

tion presented in this case is appropriate for and requires the relaxation of such rule.

Cf. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967).

The facts as to McGee's I-O claim are sufficiently unusual to allow us properly to depart from the exhaustion doctrine: McGee presented a strong case for a I-O classification; his local board did not require a personal interview as a prerequisite for processing such a claim; McGee's file contains no information reasonably contradicting his claim; the board chairman inaccurately thought that a letter in support of McGee advised the board that McGee would not accept a I-O; and when the board did "consider" the application, it dismissed it on the inaccurate assumption that the claim had already been rejected on the merits.

Finally, and perhaps most important, the failure of the local board to consider McGee's claim on the merits could not have been called to the attention of an appeal board because McGee could not know about that error and nothing in the record would disclose it. It is true that the appeal board might have reversed the denial of a I-O classification to McGee simply because it thought that he had made out a sufficient case. But that should not be dispositive in deciding whether to apply the exhaustion doctrine here. The appeal board might also have regarded the case, on the record as then known, as a close one which could go either way on the facts. Accordingly, even though review by the appeal board is *de novo*, the balance might have been tipped either way by a desire not to set aside the action of a local board. In such a case, a fair determination of the claim on the merits by the local board would be crucial. And, of course, that is precisely what McGee did

not get. In *Knox* v. *United States*, 200 F.2d 398, 402 (9th Cir. 1952), the Ninth Circuit met the argument that a *de novo* review by an appeal board cured the failure of the local board to consider evidence supporting a claim of conscientious objection. The court rejected that contention as follows:

> Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities.

This language in *Knox* has been cited with approval by the Ninth Circuit, most recently in *Welsh* v. *United States*, 404 F.2d 1078, 1083 (9th Cir. 1968), cert. granted, 396 U.S. 816 (1969), as well as by our own, *Mintz* v. *Howlett*, 207 F.2d 758, 762 (2d Cir. 1953), although we distinguished the latter case in *United States* v. *Corliss*, 280 F.2d 808, 816-18 (2d Cir.), cert. denied, 364 U.S. 884 (1960) (claim of procedural unfairness but not failure to consider on merits).

It is true that there are compelling reasons behind the exhaustion doctrine, and I do not suggest that the requirement be cast aside when the registrant ignores the local board altogether and gives it no facts at all. Nor is it necessary in this case to resolve the issue whether failure to appeal denial of a I-O claim should generally

be fatal at a subsequent criminal trial to the defense of invalidity of a I-A classification, a question which has recently split the Ninth Circuit, *Lockhart* v. *United States*, —— F.2d ——, 2 S.S.L.R. 3432 (9th Cir. 1969) (*in banc*) (8-2); cf. *United States* v. *Palmer*, 223 F.2d 893 (3d Cir.) (*in banc*) (4-3), cert. denied, 350 U.S. 873 (1955). I would hold only that the exhaustion doctrine need not be inexorably applied when the basic error of the local board could not be disclosed by the appeal, and should not be invoked when the registrant did give all of the pertinent information to the local board and it never passed upon the merits at all. On this record, McGee's failure to appeal from the board's I-A classification should not be fatal, and the exhaustion doctrine should not be applied to McGee. I would hold that he should have been classified I-O, and would set aside the conviction on Count 1.

The majority opinion had no occasion to consider the convictions on Counts 2 and 3, and did not find it necessary to deal with Count 4. However, since I would reverse the conviction on Count 1, it does seem necessary for me to consider the other counts, albeit very briefly.

Count 2 charged McGee with failing to report for his pre-induction physical examination in October 1967, after he had been reclassified I-A. It is undisputed that McGee did not report. However, he argues that had he received the I-O classification to which he was entitled, his failure to report could not constitute a crime. This contention is essentially correct. The Order to Report (SSS Form 223) which was sent to McGee by his local board quite clearly indicates to a I-O registrant that failure to report for a physical examination would not subject him to fine and imprisonment, as it would I-A and I-A-O registrants, and indeed would have no effect

at all on his obligation to perform civilian work.[1] Under those circumstances, the notice to a I-O registrant to report for a physical examination is for his benefit and is not a "duty required of him" under 50 U.S.C. App. §462 (a). See *United States* v. *Mendoza*, 295 F. Supp. 673, 683 (E.D.N.Y. 1969); *United States* v. *Walsh*, 279 F. Supp. 115, 118-19 (D. Mass. 1968). Cf. *Shoemaker* v. *United States*, 413 F.2d 274, 275 (9th Cir.), cert. denied, 396 U.S. 837 (1969). It is true that *McKart*, *supra*, 395 U.S. at 203, contains dicta suggesting that an invalid classification "would not be a defense today to a prosecution for failure to report for a pre-induction examination." However, *McKart* did not deal with the wrongful denial of a

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1 The Order to Report (SSS Form 223) states:

> TO CLASS I-O REGISTRANTS:
>
> This examination is given for the purpose of determining whether you are qualified for military service. If you are found qualified, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service.

There is a sharp distinction in the advice the Form gives to a Class I-A and I-A-O registrant; he is told that:

> If you fail to report for examination as directed, you may be declared delinquent and ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

See also Local Board Memorandum No. 14, reported in S.S.L.R. 2160 (1969), which provides:

> 3. Action by Local Board Subsequent to Refusal of Its Own Registrants to Submit to Armed Forces Examination. . . .
>
> (b) If the registrant is in Class I-O, consider him for all purposes as if he had been physically and mentally examined and found acceptable for military service and process him thereafter in the same manner as any other registrant in Class I-O who has been found acceptable for service after being given an armed forces physical examination. . . .

I-O classification, and thus did not consider the option to waive a physical examination which is afforded to registrants holding such a classification. McGee should not be penalized because of the board's error, or deprived of the benefit of selective service procedures designed for conscientious objectors. Therefore, McGee's conviction on Count 2 should also be set aside.

Having thus concluded that because McGee was improperly denied classification as a conscientious objector he should have been acquitted on Counts 1 and 2 of the indictment, there remains a grave issue as to the proper treatment of his convictions on the remaining two counts. These charged that McGee knowingly failed to have in his personal possession a valid Notice of Classification (Count 3) and failed to submit information requested by his local board (Count 4). Appellant also attacks his conviction on these counts, but his arguments—particularly as to Count 3—are not very persuasive.

My problem is of a different sort. Having found error in Counts 1 and 2, I am left with the uneasy feeling that the case might have turned out differently if only Counts 3 and 4 had been involved. All of McGee's offenses grew out of the same operative fact: his policy of non-cooperation with his draft board starting in April 1967. Yet because of his earlier request, he was entitled to be classified I-O. If he had been so classified in September 1967—when he should have been—there is at least doubt that he would have become involved with the criminal law at all. It is true that he then would have been liable for civilian alternate service and presumably would have been ordered to report for it; we simply do not know whether, despite earlier contrary indications,[2] he would have obeyed such an order, which would have recognized the sincerity of

2 *Cf.* majority opinion, note 8.

his convictions. If he had, it is difficult to believe that prosecution on Counts 3 and 4 would have followed.[3] And, in any event, there is a substantial question whether the jury or the judge would have reacted differently to prosecution of a conscientious objector on Counts 3 and 4. Although the trial judge certainly acted within his authority when he sentenced McGee to concurrent two year terms, he might well have given McGee a shorter prison sentence, or even probation, had he known that McGee should have been classified as a conscientious objector and could not be convicted on Counts 1 and 2. I am aware that it is only

> on rare occasion that we have set aside a conviction on otherwise presumably "good" counts because of defects in the conviction of a defendant on "bad" counts.

United States ex rel. Weems v. *Follette*, 414 F.2d 417 (2d Cir. 1969); cf. *United States* v. *Bottone*, 365 F.2d 389, 394 (2d Cir.), cert. denied, 385 U.S. 974 (1966). This case is an appropriate instance for exercising such discretion. See *United States* v. *Barash*, 365 F.2d 395, 403 (2d Cir. 1966); *United States* v. *Hines*, 256 F.2d 561, 563 (2d Cir. 1958). Doing so would not only eliminate any doubt that McGee was prejudiced on Counts 3 and 4 by the invalid convictions on Counts 1 and 2, it would also afford the Government an opportunity to consider whether it still wishes to press the prosecution on Counts 3 and 4 against this conscientious objector and divinity student.

Accordingly, I would reverse the convictions on Counts 1 and 2 and direct a judgment of acquittal, and reverse the convictions on Counts 3 and 4 for further proceedings consistent with this dissenting opinion.

---

3 Indeed, the Selective Service authorities in this case did not recommend prosecution on Count 4, even though McGee refused to obey the induction order. Gov't Exs. 39, 40.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

VINCENT FRANCIS MCGEE, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

A true copy,

A. Daniel Fusaro
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

Order Denying Rehearing

33568

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

VINCENT FRANCIS McGEE, JR.,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
J. JOSEPH SMITH

I dissent— WILFRED FEINBERG
U.S. Circuit Judges

May 7, 1970.

A true copy,

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

Rehearing In Banc

33568

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

VINCENT FRANCIS McGEE, JR.,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

May 7, 1970

A true copy,

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

Order of the Supreme Court Granting Certiorari, Filed October 19, 1970

[See Opposite]

Supreme Court of the United States

Supreme Court of the United States

No. 362 ----, *October Term, 19* 70

Vincent Francis McGee, Jr.,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed October 19, 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

A true copy E. ROBERT SEAVER
Test:

FILE COPY

Supreme Court, U.S.
FILED
JUL 6 1970
E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS MCGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel

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3—Certiorari should be granted because the Court below, in improperly upholding petitioner's I-A classification and conviction on Count 1, affirmed petitioner's conviction on Counts 2 and 3 without considering what the proper result would have been if the I-A classification were invalid and declined to consider at all the conviction on Count 4 26

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

VINCENT FRANCIS McGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 31, 1970.

Opinion Below

The opinion of the Court of Appeals is not officially reported. It is unofficially reported at 2 SSLR 3607 and is set out in the Appendix, *infra*, pp. 1a-18a.[1] The dissenting opinion of Circuit Judge Feinberg is set out at pp. 19a-29a of the Appendix.

[1] Numbers followed by "a" refer to the pages in the Appendix to this Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1970. On May 7, 1970, the Court of Appeals denied petitioner's motion for rehearing or rehearing *in banc*. On June 1, 1970, Mr. Justice Harlan issued an order extending the time within which to file this petition for writ of certiorari up to and including July 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the exhaustion of administrative remedies doctrine should be applied when there is no basis in fact for denying a registrant an exemption for which he has applied, especially when a fundamental procedural error committed by the local board could not have been disclosed by the registrant's appeal through the administrative process.

2. Whether a registrant who meets every qualification for the statutory exemption as a divinity student may be denied a IV-D classification because he does not request that classification from his local board.

3. Whether a registrant can be convicted for failure to report for a physical examination when, if properly classified, he could not have been lawfully ordered to report or, if ordered to report, he could have waived the examination without penalty.

4. Whether a registrant who is unlawfully classified can be convicted for failing to possess a Notice of Classifica-

tion (SSS Form 110) which reflects the unlawful classification.

5. Whether a registrant's conviction for failure to submit certain information to a local board can stand if the judge charges that the jury can find the defendant guilty if he failed to complete a questionnaire, thereby precluding the jury from determining whether he did supply the requested information in some other manner.

6. Whether a conviction for failure to submit certain information to a local board can stand if the registrant substantially complied with the information-giving requirement of the Selective Service Regulations.

7. Whether petitioner's convictions on two minor counts should be allowed to stand in light of the fact that, if petitioner had been properly classified, the prosecution on these counts might not have been brought or, if brought, might have resulted in a different verdict or sentence.

Statutes and Regulations Involved

MILITARY SELECTIVE SERVICE ACT OF 1967, 50 U.S.C. APP.

Section 456(g) Regular or duly ordained ministers of religion . . . and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service (but not from registration) under this title. . . .

Section 456(j) *Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Section 462 *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or

persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Selective Service Regulations

32 C.F.R.

§1622.1 . . .

(c) . . . . The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the

latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

§1622.10 . . .

In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class.

§1622.25 . . .

(a) In Class II-S shall be placed any registrant who has requested such deferment. . . .

§1622.43 . . .

(a) In Class IV-D shall be placed any registrant . . .

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school. . . .

§1623.1 . . .

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; provided, that the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classification Questionnaire (SSS Form No. 100) within the time al-

lowed by §1621.10 of this chapter, or (2) he fails to provide the local board with any other information concerning his status which he is requested or required to furnish. . . .

§1623.2 . . .

Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible. . . .

§1623.5 . . .

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. . . .

§1628.11 . . .

(b) . . . the local board shall mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to registrants who have been classified in Class I-A, Class I-A-O, and Class I-O. . . .

(c) The local board may also mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to any registrant who is classified in a class other than Class I-A, Class I-A-O, or Class I-O if it determines that his induction may shortly occur. . . .

§1641.2 . . .

(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.

Statement of the Case[2]

Petitioner is a Roman Catholic who, at the time he was ordered to report for induction, was a student at the Union Theological Seminary in New York City. He registered with Local Board 15 in Manhattan in August 1961 and informed the board a month later that he was "a student preparing for the ministry at the Cathedral College of St. Joseph's Seminary . . . under the direction of the Roman Catholic Church." After enrolling in the University of Rochester, he was granted a II-S (student) deferment. In February 1966, while still classified II-S, petitioner requested conscientious objector status, stating that it was his "intention to continue on to actual ordained Priesthood." The clerk of his board wrote him on March 23:

> "This will advise that the recent evidence submitted concerning your case has been reviewed by the Local Board. It is the decision of the Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.
>
> However, we wish to advise that your claim as Conscientious Objector will be considered when you no longer qualify for a student classification." App., *infra*, p. 3a.

Petitioner later requested and was granted a further II-S classification in October 1966.

In April 1967, while still classified II-S and enrolled in the University of Rochester, petitioner wrote President

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[2] Except for those facts which are supported by references to the transcript of trial (designated by the letter "T"), the statement of the case is based upon the opinion of the Court of Appeals.

Johnson, enclosing remnants of his torn and burnt draft card. This letter stated that even though he had "already been accepted for graduate study in a program where" he "would probably qualify for theological deferment," he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy." App., *infra*, p. 3a. Petitioner's local board received a copy of this letter, apparently considered reopening his classification and decided against it, and, in any event, did not change his II-S classification and deferment. App., *infra*, p. 3a.

Following graduation from the University of Rochester in June 1967, his board sent him a Current Information Questionnaire (SSS Form 127). Petitioner returned it unanswered and in a covering letter announced that "further correspondence" from the draft board would "simply be returned unopened," consistent with his belief that "cooperation is approval." On September 19, 1967, petitioner was reclassified I-A, notwithstanding his still pending application for conscientious objector status. The Board mailed him a notice of classification and a letter informing him that he had a right to ask for a personal appearance or an appeal within 30 days. Petitioner returned this unopened, writing on the envelope:

> "Returned pursuant to previous declaration and notification." App., *infra*, p. 4a.

Petitioner matriculated in the Union Theological Seminary as a full-time student on September 27, 1967. At no time did he request a IV-D (divinity student) classification from his draft board, but petitioner's letter to the

President in April 1967, an interview with two FBI agents in May 1967, and testimony before a grand jury in November 1967, gave the government notice of his eligibility for a IV-D exemption.

Subsequently, petitioner also returned unopened an order directing him to appear for a physical examination scheduled for October 18, 1967, and did not appear for it. He returned a delinquency notice sent on November 22, 1967. Petitioner did open his induction notice, which was sent on January 11, 1968, and did pass a physical examination at the induction center. However, he refused to submit to induction.

Petitioner was indicted on February 29, 1968. In a four-count indictment, he was charged with refusal to submit to induction (Count One), refusal to report for a physical examination (Count Two), failure to have in his personal possession a valid notice of classification (Count Three), and failure to submit certain information requested (Count Four), all in violation of Title 50, App., U.S.C. §462(a) and various selective service regulations. Petitioner moved to dismiss the indictment on various constitutional and statutory grounds. The motion was denied on June 13, 1968 by Judge Edmund L. Palmieri on the ground that it presented factual matters which had to be resolved at trial. After a jury trial, petitioner was found guilty on all four counts, and on January 16, 1969, was sentenced by Judge Thomas F. Murphy to two years on each count, the sentences to run concurrently.

Petitioner's conviction was affirmed by the Court of Appeals, Circuit Judge Feinberg dissenting, on March 31, 1970. Judge Feinberg stated that petitioner should have been classified I-O and that the exhaustion doctrine should

not have been applied to petitioner's failure to appeal from his I-A classification. He believed that Counts 1 and 2 should have been reversed and a judgment of acquittal directed on the basis of the improper classification and that Counts 3 and 4 should have been reversed for reconsideration. App., *infra*, p. 29a.

Reasons for Granting the Writ

Petitioner maintains that his local board acted unlawfully in classifying him I-A in September 1967, when he should have been classified either IV-D or I-O. On that premise he claims that he cannot be convicted of refusing to submit to induction (Count 1) because his order to report for induction was illegal; that he cannot be convicted of refusing to report for a physical examination (Count 2) because if he had been properly classified, he would not have been called for a physical or, if called, could have waived the examination without penalty; that he cannot be convicted of failing to possess a valid notice of classification (Count 3) because his I-A classification was invalid, and that he cannot be convicted of failure to supply information to his local board (Count 4) because he substantially complied with its request and because any information not supplied was favorable to him.

1. Certiorari should be granted because the decision of the Court below, upholding petitioner's conviction because he failed to exhaust his administrative remedies, is in conflict with the decision of the Fourth Circuit Court of Appeals in *United States* v. *Davis*, 413 F.2d 148 (1969) and the decisions of this Court in *McKart* v. *United States*, 395 U.S. 185 (1969) and *McNeil* v. *United States*, 395 U.S. 463 (1969).

This Court, in *McKart* v. *United States*, 395 U.S. 185 (1969), warned generally that the " . . . use of the exhaustion doctrine in criminal cases can be exceedingly harsh . . . [and] should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review." 395 U.S. at 197.

Section 6(j) of the Military Selective Service Act of 1967 (the "Act"), 50 U.S.C. App. §456(j), provides that conscientious objectors shall be exempt from military service. The majority below and the dissenting judge agreed that petitioner presented sufficient information to his local board to warrant his classification as a conscientious objector and that the local board had no "basis in fact" for denying him that status. App., *infra*, pp. 11a and 19a. Therefore, the I-A classification and induction order which followed must have been unlawful, regardless of any failure of petitioner to appeal his I-A classification. Having provided the Selective Service System with sufficient information to establish that he was a conscientious objector, petitioner did all that the statute required of him. The effect of the majority opinion is to use a rule of "comity

and not power," *United States ex rel. Tobias* v. *Laird*, 413 F.2d 936, 939 (4th Cir. 1969)—a rule for which there is no authority in the Act, *McKart* v. *United States*, 395 U.S. 185, 197 n. 14 (1969)—as a means for denying an exemption which is mandated by the Act.

The majority was led to this result by an unnecessarily restrictive reading of *McKart* v. *United States, supra*. As Judge Friendly, writing for the majority, points out, this Court discussed the possible application of the exhaustion rule in other than sole surviving son cases. But it should be noted that the Court said only that use of the exhaustion rule "may"—not "shall"—be appropriate in other cases. 395 U.S. at 200.

Indeed, this Court, in vacating and remanding *McNeil* v. *United States*, 395 U.S. 463 (1969), for further consideration in light of *McKart*, has clearly indicated that the exhaustion rule should not be applied under circumstances similar to those present here. The Court of Appeals in *United States* v. *McNeil*, 401 F.2d 527 (4th Cir. 1968) (Craven, *J.*), had declined to review a claim of improper denial of a ministerial and conscientious objector claim because the registrant had failed to appeal his classification.[4] Subsequent to the remand in *McNeil*, Judge Craven reconsidered the issue presented by *McNeil* and stated:

> "We think *McKart* undermines the rule in this and other circuits that in conscientious objector and ministerial status cases the district court ordinarily need

[4] Counsel has been advised by the clerk of the United States District Court for the Eastern District of Virginia, that, on remand, a judgment of acquittal was entered on January 20, 1970 by Judge Merhige.

> not examine the selective service file to determine whether or not there exists a basis in fact for the I-A classification unless the registrant has appealed to the Administrative Appeal Board." *United States* v. *Davis*, 413 F.2d 148, 151 (4th Cir. 1969).

In short, this Court has said that the exhaustion doctrine should not preclude a district court from considering the denial of any exemption simply because of the failure to pursue an administrative appeal. The Fourth Circuit has adopted that position. The Court below rejected it.

The majority below reviewed the factors which *McKart* says weigh in favor of applying the exhaustion rule and found three of the four factors present in the instant case. *McKart*, however, did not say that the presence of those factors *mandates* application of the exhaustion rule. Nor could it have, for in fact all three factors were present in *McKart*.

The first of those factors, that petitioner might have been "successful in vindicating his rights in the administrative process," App., *infra*, p. 13a, was obviously present in *McKart*. Petitioner there, just as petitioner here, could have appealed the denial of his claimed exemption and been granted it.

The second factor is related to the first, namely "that the agency be given a chance to discover and correct its own errors." App., *infra*, p. 13a. No one would question that this factor was present in the case at bar and in *McKart*.

It should be understood that these first two factors should properly count for little in an individual criminal

case unless relaxation of the exhaustion rule will encourage others to avoid the regular administrative channels and thereby undermine their effectiveness. In other words, justice should demand that a defendant not be prevented by application of the exhaustion rule from asserting a valid defense unless others will thereby be led to follow his example and ignore entirely the available administrative procedures. This is the third factor which Judge Friendly draws from *McKart*, and petitioner respectfully suggests that it is answered by *McKart* itself:

> "We doubt whether many registrants will be foolhardy enough to deny the Selective Service System the opportunity to correct its own errors by taking their chance with a criminal prosecution and a possibility of five years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies before deciding whether or not to continue the challenge to their classification. . . . In short, we simply do not think that the exhaustion doctrine contributes to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction." 395 U.S. at 200.

It simply does not make sense for a registrant seeking a deferment or exemption to bypass his administrative remedies even if he knew that a court would review his claim. His right of review in court would still be limited to whether there was a "basis in fact" for denying his claim, whereas he would only have to convince the Selective Service System that, on the weight of the evidence, he deserves the classification. In short, the assumption

that a holding for petitioner would "multiply the already heavy burden that cases like his are imposing on the courts," App., *infra*, p. 18a, is unsupportable. There in fact have been very few cases like petitioner's in the past (the majority cited only *United States* v. *Palmer*, 223 F.2d 893 (3rd Cir.)), *cert. denied*, 350 U.S. 873 (1955), and it is hardly likely that registrants may be moved to a position of non-cooperation with Selective Service by analyzing whether it would improve their chances in court.

Not only does *McKart* impliedly or directly give little weight to the factors cited by the majority as justifying the application of the exhaustion doctrine in this case, but the fact that the local board committed a fundamental procedural error further militates against application of the exhaustion rule. As Judge Feinberg demonstrated, App., *infra*, pp. 19a-22a, the record is clear that petitioner's local board failed to ever consider his application for conscientious objector status on its merits. That failure is not only a violation of the regulations, 32 C.F.R. 1622.1 (c), but a direct violation of the Act, which requires that a local board "shall . . . hear and determine . . . all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title . . . " 50 U.S.C. App. §460(b)(3). By failing to consider petitioner's application, the board avoided its most fundamental responsibility under the Act, to gather information so as to properly classify the registrant. What the majority calls "an inadvertent failure," App., *infra*, p. 15a, was in fact so "basically lawless" that a court may intervene without requiring appeal through the administrative system. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233, 237-38 (1968). See also, *Hunt* v. *Local Board No. 197*, 423 F.2d 576 (3rd Cir.

1970); *Barker* v. *Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969). This is in accordance with the general principle that exhaustion is not required where the administrative agency exceeds its jurisdiction. See generally, Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 *Geo. L.J.* 315, 322-31 (1967); *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967).

The majority below avoided this issue by suggesting that the board first considered petitioner's application when it was filed in February 1966. Judge Feinberg correctly points out, App., *infra*, p. 19a, however, that, since petitioner was then entitled to a II-S deferment, it would have been inappropriate to consider his conscientious objector claim at that time. 32 C.F.R. 1623.2. The Second Circuit so held in *United States* v. *Bornemann*, —— F.2d ——, 2 SSLR 3484 (2d Cir. 1970). The only reasonable reading of the local board chairman's testimony at trial is that the board followed the normal procedure and deferred consideration of McGee's application until he was no longer entitled to a lower classification. App., *infra*, pp. 20a-21a. This interpretation of the board's action is supported by the requirement that a consideration of the merits of petitioner's claim would have required a re-opening and the issuance of a new classification card (SSS Form 110). *Mulloy* v. *United States*, 38 U.S. Law Wk. 4509 (S. Ct. June 15, 1970); *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967); *United States* v. *Gearey*, 379 F.2d 915, 922 n. 11 (2d Cir. 1967). The board did not send petitioner a new classification card because it did not consider his claim on the merits.

Nevertheless, when petitioner no longer qualified for a II-S classification and his conscientious objector claim

again came before the board, the board did no more than reaffirm its earlier decision. App., *infra*, p. 22a (Feinberg, *J.*, dissenting). Thus, on neither occasion did the board reach the merits of petitioner's conscientious objector application. As Judge Feinberg notes, an appeal by petitioner of his I-A classification would not have revealed that procedural deficiency since petitioner could not have known about it nor would his file have disclosed it. App., *infra*, p. 24a. Under these circumstances, the interest in requiring exhaustion is particularly insubstantial. The Ninth Circuit Court of Appeals recently agreed with this position:

> "A major premise supporting the requirement of exhaustion is that recourse to the full administrative process might satisfactorily have resolved the debated issues. Accordingly, it is unlikely that a court would require exhaustion if an administrative body's actions constitute a readily discernible error of a type unlikely to be corrected by further recourse to the administrative process and resulting in great injury to a party or to the public." *Craycroft* v. *Ferrall*, 408 F.2d 587, 594 (9th Cir. 1969).

Petitioner submits that the decisions in *McKart* and *McNeil* do not, as the majority below seemed to suggest, carve out a narrow exception to the exhaustion rule, but rather suggest broad disapproval of that rule when it operates to deprive a defendant of a substantial defense to a criminal prosecution. Where, as here, the registrant presents to the Selective Service System all the facts necessary to support an exemption and it is denied him arbitrarily and without a "basis in fact," there is no reason why a court should not review the legality of that classification.

In fact, courts do so all the time in cases where appeals have been taken. If the registrant fails to avail himself of his right to appeal, it should be enough that he forfeits one of his opportunities to secure the desired classification. The courts should still avail themselves of the opportunity to review lawless administrative action. Here, petitioner's board acted lawlessly, both in failing to consider his application and in denying him conscientious objector status without a "basis in fact." That lawless action should not be permitted to stand.

Petitioner respectfully submits that this Court should grant certiorari in order to resolve the conflict between the decision of the Court below and the decision of the Fourth Circuit in *United States* v. *Davis, supra,* and the decisions of this Court in *McKart* v. *United States, supra,* and *McNeil* v. *United States, supra.*

2. Certiorari should be granted because the decision of the Court below, upholding the denial of petitioner's right to a divinity student exemption, is in conflict with the decisions of this Court in *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968) and *McKart* v. *United States*, 395 U.S. 185 (1969).

Section 6(g) of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(g), exempts full-time students of recognized divinity schools who are preparing for the ministry under the direction of recognized churches. See also, 32 C.F.R. 1622.43.

Petitioner's entitlement to a IV-D classification, we believe, is indisputable. That petitioner did not request the

classification is of no consequence. Unlike the language in Section 456(h)(1) of the Act and 32 C.F.R. 1622.25 providing for student deferments, which requires the registrant to request the classification, the language of the ministerial exemption is mandatory; one who qualifies "*shall* be exempt from training and service." Section 456 (g) (emphasis added). See *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968). See also, *Turley* v. *Selective Service System Local Board No. 134*, 301 F. Supp. 845 (C.D. Cal. 1969). This view of the exemption was adopted by the court in *Kimball* v. *Selective Service Local Board No. 15*, 293 F. Supp. 266, 267 (S.D.N.Y. 1968), which assumed that the exemption had to be granted even though not requested.

> "Although [plaintiff] Jack is now a full-time divinity student, he has not sought to be reclassified IV-D. . . . Because Jack was not present at the hearing of this motion and because defendants did not produce his file, it is not clear whether, before this motion, his draft Board was aware of his entitlement to a clear statutory exemption from military service. 50 U.S.C. App. §456(g) . . . . Petitioner here has, before induction, made known his entitlement to exemption. . . . This exemption is mandatory, not permissive. See 50 U.S.C. App. §456(g); 32 C.F.R. 1622.43(a)."

As in *Kimball*, petitioner, although not requesting an exemption, made known to the Government that he qualified for it. In fact, it was the uncontradicted testimony at trial that petitioner advised the Government on at least four separate occasions of his attendance or prospective attendance at divinity school.

In his original Classification Questionnaire (SSS Form 100) completed soon after he registered, petitioner advised

his board that he was preparing for the ministry under the direction of the Roman Catholic Church. App., *infra*, p. 2a. Then in writing President Johnson on April 15, 1967, petitioner said that he had been "accepted for graduate study in a program where I would probably qualify for the theological deferment". The letter was forwarded to his local board on April 26, 1967. App., *infra*, p. 3a.

In May 1967 petitioner was interrogated by two FBI agents, at which time he told them that he had been accepted for admission to Union Theological Seminary, that he would begin studies there in September of that year, and that one of his mailing addresses would be the dormitory at the Seminary. At trial, a third agent testified somewhat ambiguously of a conversation with a board clerk on May 19, 1967, during which he asked her if petitioner's present classification would be changed if he were to attend Union Theological Seminary (T. 71-72).

Finally, in November 1967, petitioner testified before a federal grand jury investigating Selective Service violations and explicitly stated that he was a divinity student at Union studying for the Roman Catholic priesthood (T. 214). The grand jury was convened in the Southern District of New York, and the questioning of petitioner was conducted by John Robinson, the same Assistant United States Attorney who later brought petitioner's indictments and prosecuted the case in the trial court.

The import of these events is apparent. From the time of petitioner's first Classification Questionnaire in 1961, up to and including the time the local board classified him I-A in September 1967, ordered him to report for a physical in

October and ordered him to report for induction in January 1968, it had substantial information to suggest that petitioner was entitled to a IV-D classification.

The majority claims, however, that petitioner did not submit sufficient proof of his entitlement to the IV-D classification, that there was a "basis in fact" for denying petitioner the exemption in that he failed to provide evidence that he was studying "under the direction of" his church. But the procedure directed by Selective Service National Headquarters in Local Board Memorandum No. 56 places this burden on the Local Board. In order to substantiate claims for ministerial exemptions, a local board "must require" the registrant to furnish evidence that:

> "(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and
>
> (2) He is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school . . ."

Furthermore, the Memorandum directs that:

> "If the local board considers the information it has received to be insufficient for the purpose of making a determination, it should request assistance or additional information from the State Director of Selective Service."

Thus, it was the obligation of the board, upon receiving information that petitioner may have been entitled to a IV-D classification, to solicit the additional information described in the Memorandum.

It is clear from the Memorandum that the duty imposed on the board could not be met by merely sending a Current Information Questionnaire (SSS Form 127) since that form solicits no more information about attendance at divinity school than the board already had in its possession (Govt. Ex. 30, especially "Series V.—Education"). In other words, that form would not have given the information required by Local Board Memorandum No. 56.

As for Assistant United States Attorney Robinson, he acquired personal knowledge in the grand jury room of petitioner's entitlement to a IV-D weeks before an induction order was mailed. Nevertheless, he secured indictments some three months later with full knowledge that the board actions on which they depended were wholly unlawful.[4] Had petitioner been properly classified and thus exempt from service, it is unlikely that any of petitioner's indictments would have been brought.[5]

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[4] This would seem to do clear violence to the letter and spirit of the representation made to the Supreme Court by the Solicitor General in *Oestereich, supra*. In his Brief for the Respondents, arguing that review of the punitive reclassification of a divinity student could be had in a prosecution for induction refusal, the Solicitor General said:

> "... in view of the explicit exemption granted by Section 6(g), the Attorney General would not have started such a prosecution ..." (p. 64)

The Solicitor General goes on to say that if, as in this case, the Attorney General did proceed with a prosecution, "it would have been the clear duty of the court to have dismissed the prosecution on a showing that petitioner comes within the exempted class." (*Ibid.*)

[5] In an official publication of the Selective Service System, *Legal Aspects of Selective Service* (1969), the following statement appears:

(*continued on next page*)

The information given to Robinson was effective notice of petitioner's eligibility for a IV-D even though not given directly to the board. It is not necessary, as the Second Circuit has recognized, that a claim for exemption be made directly to the board. *United States* v. *Stafford*, 389 F.2d 215 (2d Cir. 1968); *United States* v. *Holmes*, —— F.2d ——, 2 SSLR 3489 (2d Cir. 1970). This is in accordance with the position recently taken by Chief Judge Solomon in *United States* v. *Hanna Nickel Smelting Company*, 253 F. Supp. 784, 793 (D. Ore.), *aff'd* 400 F.2d 944 (9th Cir. 1968):

> "The Government, like a private corporation, acquires knowledge through its agents. Under well-established principles of agency, a principal is bound by the knowledge of its agents concerning a matter upon which it is the agent's duty to give the principal information. Restatement Agency 2d § 272. It is no defense that the agent did not, in fact, communicate his knowledge to the principal."

We need not consider the outer limits of this agency principle in all draft cases. Suffice it to say that in this case the information was not conveyed to some remote agent

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"Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work. . . . By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12(a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards" (p. 47).

of the Government in the Food and Drug Administration. Rather it was given to a Justice Department lawyer, intimately familiar not only with Selective Service law but with the young man against whom he ultimately sought indictments. There can be no denying that the Government, before initiating these proceedings, knew that petitioner was in divinity school. That being the case, the statute's command is unequivocal: he *"shall"* be exempt.

In contrast to the statute's mandatory language regarding divinity student exemptions, there is no language in the statute "which would require registrants to raise all their claims before the appeal boards." *McKart* v. *United States*, 395 U.S. 185, 197 (1969). Yet the majority below was of the opinion that the exhaustion doctrine foreclosed judicial review of petitioner's IV-D claim. In effect, the majority allowed a judge-made rule to operate in derogation of rights granted by statute.

Moreover, the judicial convenience which the rule typically serves—to spare courts the burden of hearing evidence more properly presented to the Selective Service System—can no longer be served here. The trial judge took substantial evidence regarding petitioner's entitlement to a ministerial exemption, without objection by the Government. Inasmuch as the trial court, in its discretion, decided to consider the propriety of petitioner's classification, no contrary interest was served by the Second Circuit invoking the exhaustion rule.

The decision below regarding petitioner's claim of a divinity student exemption is in conflict with the decisions of this Court in *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968) and *McKart* v.

United States, 395 U.S. 185 (1969). This is a substantial reason for review.

3. Certiorari should be granted because the Court below, in improperly upholding petitioner's I-A classification and conviction on Count 1, affirmed petitioner's conviction on Counts 2 and 3 without considering what the proper result would have been if the I-A classification were invalid and declined to consider at all the conviction on Count 4.

A. The conviction for refusal to report for a physical examination (Count 2) cannot stand.

The Selective Service regulations permit a board to call for a physical examination only those registrants who are classified I-A, I-O, or I-A-O, 32 C.F.R. 1628.11(b), or, if in another classification, who are subject to imminent induction, 32 C.F.R. 1628.11(c). If petitioner had been properly classified IV-D, the board would have had no reason to believe his induction was imminent and, therefore, he could not have been lawfully ordered to report for a physical examination. If petitioner had been classified I-O, his refusal to submit to the examination would not have been criminal, since Selective Service allows those in that classification to waive the examination without penalty. *Shoemaker* v. *United States,* —— F.2d —— (9th Cir. 1969); *United States* v. *Mendoza,* 295 F. Supp. 673 (E.D. N.Y. 1969); *United States* v. *Walsh,* 279 F. Supp. 115 (D. Mass. 1968). See also, Selective Service System Form 223; Local Board Memorandum No. 14; App., *infra,* pp. 27a-28a (Feinberg, *J.*, dissenting).

B. Since petitioner was improperly classified I-A, he was not guilty of failing to possess a valid notice of classification (Count 3).

Petitioner was indicted for failing to possess the I-A classification card mailed to him in September 1967. The requirement of the regulation is that the registrant possess a *valid* Notice of Classification (SSS Form 110). 32 C.F.R. 1623.5. Since, as shown above, petitioner's classification should have been either IV-D or I-O, his I-A classification was invalid. His failure to possess an invalid card was, therefore, not in violation of the regulation.

Were it otherwise, it would defeat the functions of the possession requirement discussed in *United States* v. *O'Brien*, 391 U.S. 367, 378, 379 (1968). Since none of these functions could be served by a card with an incorrect classification, it is clear that the failure to possess such a card cannot be considered a violation of 32 C.F.R. 1623.5. This position was explicitly adopted in *United States* v. *Hertlein*, 143 F. Supp. 742 (E.D. Wis. 1956).

C. The conviction on Count 4 cannot stand because petitioner substantially complied with the requirement that he submit the information requested by his board.

Petitioner was charged with failing to submit the information solicited by a Current Information Questionnaire (SSS Form 127) mailed to him in July 1967. He was not charged with having failed to return the questionnaire itself. Nevertheless, Judge Murphy charged the jury that they could find the requisite intent under this count merely by determining that petitioner knowingly failed to return the questionnaire. T. 289. Thus, the jury was not told that they should be determining instead whether the information sought by the board was in fact in its possession either at the time the questionnaire was mailed or

was supplied sometime before the bringing of the charges. Had the jury been so instructed, they could reasonably have found that petitioner had provided his mailing address several times during that period and enough information on previous occasions so that the board could easily have classified him in whatever classification for which they found him qualified. The instruction was so fundamentally prejudicial as to compel a reversal of the conviction.

Quite apart from the jury instruction, the prosecution under this count is in clear derogation of the statutory scheme regarding the requirement that registrants supply information affecting their classification. The regulations require that a registrant provide the information necessary to prove his entitlement to deferment. 32 C.F.R. 1622.1, 1622.10, 1623.1(b) and 1641.2(b). Failing to do so, he waives his right to the deferment. *Dickinson* v. *United States*, 346 U.S. 389 (1953). It is hardly reasonable to assume that Congress intended to make his failure criminal as well since the only resulting harm would be to the registrant and not to the system.

That Selective Service contemplates waiver of the deferment as the sole penalty for failing to provide such information is apparent from their recommendation that no prosecution be brought on these grounds, App., *infra*, p. 29a, and from the fact that counsel has been unable to find any reported decision of a prosecution for failure to provide information which would have benefited the registrant. The reported cases all involved a failure by a registrant to provide information which would have proved detrimental to the registrant. See, *e.g.*, *United States* v. *Lembo*, 76 F. Supp. 209 (E.D. Pa.), *rev'd, sub nom. United States* v. *Aleli*, 170 F.2d 18 (3rd Cir. 1948); *United States* v. *Haug*, 150 F.2d 911 (2nd Cir. 1945), *cert. denied*, 324

U.S. 876 (1945); *Stumpf* v. *Stanford*, 145 F.2d 270 (5th Cir. 1944).

Only this approach to non-prejudicial violations of the regulations by registrants explains the failure to prosecute the many registrants who submit to the draft by foregoing deferments available to them. It also accords with the well-recognized principle in Selective Service cases that violations of the regulations by a local board will invalidate an induction order only where there is some showing of prejudice to the registrant. See, *e.g.*, *United States* v. *Lawson*, 337 F.2d 800 (3rd Cir. 1964). Justice and good sense dictate that this be the rule where a registrant's violation of a regulation is only technical.

Although there are no cases directly holding that the failure to provide information not prejudicial to the System is not criminal, the concurring opinion of Judges Learned Hand and Swan in *United States* v. *Rubenstein*, 166 F.2d 249 (2d Cir. 1948) seems to take this position and *Bartchy* v. *United States*, 319 U.S. 484 (1943) suggests that the requirement to advise the board of a mailing address is met by substantial compliance.

D. Petitioner here received concurrent two-year sentences on four counts. This sentence was admittedly within the trial judge's authority. However, as Judge Feinberg noted, if petitioner had been properly classified I-O or IV-D in September 1967 by his local board, the alleged violation leading to indictment on Count 2 would never have occurred and the prosecutions on Counts 3 and 4 may never have been brought. Indeed, the Selective Service authorities did not even recommend prosecution on Count 4. App., *infra*, p. 29a.

Moreover, Judge Feinberg questioned whether the trial judge or jury would have reached the same results if they had been asked to try a registrant possessing divinity student or conscientious objector status on Counts 3 and 4. He also questioned whether the judge, assuming he realized that petitioner should have been classified I-O or IV-D, would have rendered a shorter sentence or possibly probation if petitioner had only been found guilty on Counts 3 and 4. App., *infra*, pp. 28a-29a.

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

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* Attorney for Petitioner gratefully acknowledges the invaluable assistance of Mr. Robert L. Robinson, a recent graduate of the Columbia University School of Law.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 177—September Term, 1969.

(Argued September 30, 1969 Decided March 31, 1970.)

Docket No. 33568

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT FRANCIS MCGEE, JR.,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and FEINBERG,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, convicting appellant, after a verdict, on a four-count indictment for violating 50 U.S.C. App. §462(a). Affirmed.

ALAN H. LEVINE, New York, N. Y. (Marvin M. Karpatkin, J. Edward Meyer, III, on the brief), *for Defendant-Appellant.*

ROSS SANDLER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, James D. Zirin, Assistant United States Attorney, on the brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Vincent Francis McGee, Jr. appeals from a judgment of conviction for violating 50 U.S.C. App. §462(a), following a trial before Judge Murphy and a jury in the District Court for the Southern District of New York. McGee was convicted on all four counts of the indictment and was sentenced to imprisonment for two years on each count, the terms to run concurrently. The indictment charged him with refusing to submit to induction (Count 1), to report for a physical examination (Count 2), to possess a valid notice of classification (Count 3), and to submit information that his local board had requested (Count 4).

I.

McGee is a Roman Catholic who is currently a student at the Union Theological Seminary in New York City. He registered with Local Board 15 in Manhattan in August 1961, and informed the board a month later that he was "a student preparing for the ministry at the Cathedral College of St. Joseph's Seminary . . . under the direction of Roman Catholic Church." He took a leave of absence from the College in 1963, during which period his board classified him I-A. In August 1964, he passed the pre-induction physical that his board had ordered. A short time later, after enrolling in the University of Rochester, he was granted a II-S (student) deferment. He was temporarily reclassified I-A in September 1965, but his II-S classification was renewed shortly thereafter. In February 1966, while still classified II-S, McGee requested conscientious objector status, stating that it was his "intention to continue on to actual ordained Priesthood." The clerk of his board wrote him on March 23:

This will advise that the recent evidence submitted, concerning your case has been reviewed by the Local Board. It is the decision of the Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.

However, we wish to advise that your claim as Conscientious Objector will be considered when you no longer qualify for a student classification.

McGee did not appeal this decision; he later requested and was granted a further II-S classification in October 1966.

In April 1967, while still classified II-S and enrolled in the University of Rochester, McGee wrote President Johnson, enclosing remnants of his torn and burnt draft card. This letter stated that even though he had "already been accepted for graduate study in a program where" he "would probably qualify for the theological deferment," he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy." McGee's local board received a copy of this letter, apparently considered reopening his classification and decided against it, and, in any event, did not change his II-S classification and deferment. Following McGee's graduation from the University of Rochester in June 1967, his board sent him a Current Information Questionnaire. McGee returned it unanswered, and in a covering letter announced that "further correspondence" from the draft board would "simply be returned unopened," consistent with his belief that "cooperation is approval." On September 19, 1967, almost two months after receipt of this letter by the local board, McGee was reclassified I-A. The Board mailed him a notice of classification and a letter clearly informing him that he had a right to ask for a per-

sonal appearance or an appeal within 30 days, that the board had a Government Appeal Agent to aid him "with a personal appearance, an appeal, or any other procedural right," and that the Appeal Agent or his representative would give him legal counsel on Selective Service matters at no charge. McGee returned this unopened, writing on the envelope

> Returned pursuant to previous
> declaration and notification.

McGee also returned unopened an order directing him to appear for a physical examination scheduled for October 18, 1967, and did not appear for it. He returned a delinquency notice sent on November 22, 1967. McGee did open his induction notice, which was sent on January 11, 1968, and did report for and pass a physical examination at the induction center. However, he refused to submit to induction.

Meanwhile, McGee had matriculated in the Union Theological Seminary as a full-time student on September 27, 1967. At no time did he request a IV-D (student for the ministry) classification from his draft board, but he claims that his letter to the President in April 1967, an interview with two FBI agents in May 1967, and testimony before a grand jury in November 1967, gave his board sufficient information to require classifying him IV-D. At trial, it was established that the Union Theological Seminary is non-denominational, and that McGee's parish priest recommended him to the Seminary. The chairman of McGee's draft board testified outside the presence of the jury that before McGee was classified I-A in September 1967, all pertinent information in his Selective Service file was reviewed. Judge Murphy found that the board considered and rejected appellant's conscientious objector claim.

McGee argues that his local board acted unlawfully in classifying him I-A in September 1967, when in his view he should have been classified IV-D or I-O. On that premise he claims that he cannot be convicted of refusing to submit to induction (Count 1) because his order to report for induction was illegal; that he cannot be convicted of refusing to report for a physical examination (Count 2) because if he had been properly classified, he would not have been called for a physical or, if called, could have waived the examination without penalty; and that he cannot be convicted of failing to possess a valid notice of classification (Count 3) because his I-A classification was invalid. He also argues that he cannot be convicted of failure to supply information to his local board (Count 4) because he substantially complied with its request and because any information not supplied was favorable to him.

II.

We shall deal first with McGee's claim that he was entitled to exemption from military service as a matter of law under 50 U.S.C. App. §456(g), which provides that:

> [S]tudents preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service (but not from registration) under this title.

McGee contends that the statutory policy is so strong that the exemption may not be denied any registrant who meets the qualifications. He concedes that he did not request the exemption from his board, but claims that no such request

is required by the statute or regulations. In any event, he argues that the local board had sufficient knowledge of his qualification for the exemption to require its issuance.

It is true that section 456(g) is a mandatory provision in the sense that a draft board may not deny a IV-D exemption to one who qualifies for it. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968).[1] However, it does not follow that a registrant may totally disregard the administrative procedures established by the Selective Service System, and rely on his own evaluation of his right to a IV-D classification in the hope that a court will subsequently support his interpretation. While *McKart* v. *United States*, 395 U.S. 185, 195 (1969), states that "[i]n Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created," it recognizes that the exhaustion doctrine may well be applicable to IV-D claims like McGee's, where the registrant is relying on facts never clearly presented—or indeed presented at all—to his local board.

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1 McGee attempts to bring his case within *Oestereich*, *supra*, on the further ground that he was denied IV-D and classified I-A as punishment for burning his draft card, writing to President Johnson, and refusing to cooperate with his local board. Apart from any other considerations, the record simply does not establish this contention. McGee wrote to the President, enclosing remnants of his draft card, in April 1967. His local board received a copy of this letter on April 27. However, appellant was not classified I-A until September 19, 1967, when his II-S deferment expired following his graduation from the University of Rochester. This was almost five months after the board was informed of the letter to the President and almost two months after McGee announced his intention to return board correspondence unopened. These are hardly the actions of a draft board that is acting lawlessly. Moreover, *Oestereich* is further distinguishable because appellant there sought redress through the Selective Service System and was unjustifiably deprived of a IV-D exemption which he had already obtained. McGee never applied for a IV-D classification and it is impossible to perceive how the local board could have punitively deprived him of an exemption he had never requested.

> Of course, it is necessary that the local board, which has the responsibility of classifying registrants in the first instance, be given the information necessary to perform its function. However, the present case does not present an instance where a registrant is trying to challenge a classification on the basis of facts not presented to the local board. In such a case, the smooth functioning of the system may well require that challenges to classifications based upon facts not properly presented to the board be barred.

395 U.S. at 198 n. 15.

McKart dealt with the proper interpretation of the "sole surviving son" exemption, 50 U.S.C. App. §456(o), which the Court found to be only a question of statutory interpretation and "certainly not a matter of discretion." *Id.* at 198. Accordingly, it refused to apply the exhaustion doctrine in that case because there was "simply no overwhelming need" to have the Selective Service System "resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution." *Id.* at 199. McKart's claim was thus in sharp contrast to "classification questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards." *Id.* at 198. Thus,

> Conscientious objector claims . . . or deferments for those engaged in activities deemed "necessary to the maintenance of the national health, safety, or interest" . . . would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service System and the courts may have a stronger interest in having the

> question decided in the first instance by the local board and then by the appeal board, which considers the question anew.

Id. at 198 n. 16. In further distinguishing the earlier body of cases which did apply the exhaustion doctrine, the Court noted that:

> [T]hose cases all involved ministerial or conscientious objector claims, claims that may well have to be pursued through the administrative procedures provided by the Selective Service laws.

Id. at 201.

McGee's claim for a IV-D exemption here depended upon resolution of essentially factual issues which are by no means conceded. This distinguishes such cases as *McKart, supra,* where the facts were undisputed, and *Oestereich, supra,* where the board had already recognized the registrant's right to a IV-D classification.[2] Whatever the draft board's determination might have been had McGee applied to it for IV-D status and supplied it with full information, even the facts adduced *at trial,* as will be seen below, do not show that he was so clearly entitled to that exemption that the draft board could have arrived at but one conclusion. Accordingly, McGee's failure even to request a IV-D exemption from the local board or supply it with any supporting information is a sufficient ground for disposition of that claim.

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2 For other cases where the claim by a student to a IV-D classification raised factual issues, see *Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304, 316-17 (1946) (nature of the seminary, motives of the registrant); *United States* v. *Bartelt,* 200 F.2d 385 (7 Cir. 1952) (whether registrant was full-time divinity student); *United States ex rel. Levy* v. *Cain,* 149 F.2d 338 (2 Cir. 1945) (nature of seminary and studies, registrant's intentions).

Beyond that it is plain that denial of a IV-D exemption to McGee would have had a "basis in fact." Under section 456(g), at least two requirements must be satisfied before a divinity student becomes entitled to a IV-D exemption: He must be a student preparing for the ministry under the direction of a recognized church or religious organization; and he must be satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school. As to the latter, it is clear that at the time McGee refused induction[3] he was a matriculated student at the Union Theological Seminary who was satisfactorily pursuing a full-time course of study. What is in dispute, however, is whether McGee was preparing for the ministry under the *direction* of a recognized church or religious organization. There is evidence in the record that McGee is a Catholic and that he intends ultimately to become a priest, but the evidence that he was studying under the direction of the Catholic Church when he refused induction is slim. His parish priest testified that he had recommended McGee to the Seminary, but that could have meant no more than that he thought McGee to be a serious and decent young man. The priest did not say he was in any way supervising McGee's course of study. According to the record, the divinity school in which McGee enrolled is non-denominational and may contain many students who have not formulated the intention of entering the ministry and are not under the direction of any church or religious organization. The record discloses that at least some of the Catholic students at the school come from Catholic seminaries to take courses there, but McGee did not. Indeed, McGee apparently had been a student at such a

3 We assume only for purposes of discussion that this is the key date, rather than some earlier time, e.g., date of reclassification by the board.

Catholic seminary, but left to go to Hunter College and then the University of Rochester, where he received a Bachelor of Science degree.[4] Accordingly, McGee's local board would not have had to conclude that he was "preparing for the ministry under the direction of" the Catholic Church. Perhaps the board would have granted the exemption had McGee made the claim directly to it; perhaps it would not. But we cannot say that if it had followed the latter course, there would have been "no basis in fact" for its action.[5]

III.

In contrast to his inaction with respect to the IV-D claim, McGee had squarely placed his I-O application before the local board when he requested and completed the Special Form for Conscientious Objector in February 1966.[6]

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4 While at the University of Rochester, McGee took some courses at Colgate Rochester Divinity School.

5 McGee claims that the trial judge incorrectly read into the statute a requirement that the divinity school itself be under the direction of a recognized church or religious organization in order that its students can qualify for a IV-D exemption. Such an interpretation of the statute would indeed be wrong since it is the student, not the school, to whom that language applies. However, we do not believe the trial judge thus misinterpreted section 456(g). Having found, correctly, that Union Theological Seminary is "a non-denominational seminary," he did not treat this as dispositive of the IV-D claim, but rather refused to treat proof of full-time attendance at a recognized non-denominational divinity school as alone supplying the other prerequisite for the exemption. In other words the finding indicated only that since Union Theological Seminary was non-denominational, the nature of the school could not of itself supply the missing element of "direction," as, for example, might be the case for a denominational seminary. We agree with that conclusion. Cf. *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 310, 316-17 (1946); *United States ex rel. Levy* v. *Cain*, 149 F.2d 338, 341 (2 Cir. 1945).

6 While McGee never protested the draft board's action, neither did he ever withdraw the application. The Government makes a fleeting argument that McGee "no longer desired a I-O deferment." If by this

He contends that there was no basis in fact for denying his conscientious objector claim and that his reclassification as I-A was thus unlawful.

We would be inclined to accept the first step in McGee's argument. In his Form 150 he expressed his belief "in a personal Supreme Being to whom obligation is superior when duties of human relations are considered," and said that "taking part in any form of military operation indicates an approval/consent situation repugnant . . . to love and service of God and fellow man." These and other statements, if sincere, established that he, "by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. §456(j). Neither his prior nor his subsequent actions were inconsistent with his assertions, see *United States* v. *Haughton*, 413 F.2d 736, 742 (9 Cir. 1969), and we see nothing in McGee's file—all that was before the board—that could reasonably put his sincerity in issue. This is particularly significant in light of the board chairman's testimony that McGee's local board did not require an interview for conscientious objector applicants, although it undoubtedly could have.[7]

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is meant that McGee had withdrawn his request for I-O, it is incorrect, as the Board was never so notified. Selective Service procedures then and now in force make clear that such a claim would have had to be withdrawn in writing. Local Board Memorandum No. 41, as amended, August 15, 1952, reported in Selective Service Law Reporter ("S.S.L.R.") 2174 (including amendments of July 30, 1968, which are not here relevant). Moreover, McGee's letter to his board, dated July 23, 1967, in which he announced his policy of non-cooperation, restates his "personal conscientious commitment."

7 The Selective Service System currently advises a local board that if it determines that it cannot grant the I-A-O or I-O classification claimed, the local board should invite or request the registrant to meet with it for an interview prior to classification. The primary purpose of the interview will be to develop further facts on which the conscientious objector claim is based, and the sincerity of such

While in this case we have the benefit of the testimony of the chairman of the local board, that does not reveal any "basis in fact" for denying McGee's application. As indicated, the statement of beliefs in his Form 150 would seem to meet the statutory test, and what little testimony there is by the board chairman concerning McGee's sincerity would, if anything, support a conclusion that the local board thought McGee was sincere. He testified that McGee "had been offered an alternative to the deferment he sought, which was a 1-O, hospital service. He did not choose to avail himself of that." He further testified that "[t]here was a letter written . . . where we were advised that the young man would not accept a 1-O or inferred that he wouldn't." This testimony was inaccurate. The letter referred to was by John A. Murray, dated February 1966; far from indicating that McGee would not accept a I-O, it was in support of his application.[8]

Acceptance of so much of McGee's argument still does not lead to his conclusion unless he is to be excused from failure to appeal his I-A classification. We see no reason for doing so. To the passages from *McKart* already quoted, we add another, 395 U.S. at 200:

> [T]oday's holding does not apply to every registrant who fails to take advantage of the administrative

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claim. This interview does not take the place of the personal appearance which the registrant may request under Section 1624.1, after the classification action.

Local Board Memorandum No. 41, as amended July 30, 1968, *supra* note 6.

8 What the chairman of the board may have meant was that McGee's application for I-O indicated that even if he were granted such a I-O, he would not report for alternative civilian service, as required under the Act. However, this eventuality never came to pass. In any event, on this record we would not regard McGee's statement that he would not accept alternate service as a "basis in fact" for denying a I-O classification.

remedies provided by the Selective Service System. For, as we have said, many classifications require exercise of discretion or application of expertise; in these cases, it may be proper to require a registrant to carry his case through the administrative process before he comes into court.

Mr. Justice Marshall listed four factors that ordinarily justify application of the exhaustion doctrine to bar a defendant from challenging a local board's classification: (1) "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"; (2) judicial efficiency may be furthered because a "complaining party may be successful in vindicating his rights in the administrative process"; (3) notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors"; and (4) "it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." 395 U.S. at 194-95. All the last three factors are present here. An appeal might well have led to McGee's obtaining a I-O classification and have avoided the judicial—and prosecutorial—effort that his flouting of the processes of the Selective Service System has caused. The System should have been given an opportunity to correct the error of the local board. And sanctioning McGee's deliberate refusal to avail himself of procedures which the Government had made available to him would encourage others to do so, especially in cases where the chances of success in court seem good.

On all this we find ourselves in agreement with the sensitive opinion of Judge Goodrich and in disagreement

with the able dissent of Judge Maris in a case strikingly similar to McGee's, *United States* v. *Palmer*, 223 F.2d 893 (3 Cir.), *cert. denied*, 350 U.S. 873 (1955). We agree also with the decision of another court of appeals, made in the light of *McKart*, which refused to excuse failure to appeal the revocation of a hardship deferment, *United States* v. *Powers*, 413 F.2d 834 (1 Cir. 1969).[9] The entire subject has just been exhaustively canvassed by the Ninth Circuit in *Lockhart* v. *United States*, decided December 18, 1969, 2 SSLR 3432, and we agree with Judge Ely's opinion for a majority of the court *in banc*. Moreover, the position taken by the two dissenting judges supports "forfeiture of judicial review" for failure to exhaust "when the registrant has deliberately sought to subvert and evade the administrative process," the situation here, as distinguished from a case where the "default was merely inadvertent or negligent."

Our brother Feinberg argues for a different result on the basis that the board "never passed on" the conscientious objector claim. We do not read the record that way. The board chairman, called as a defense witness at the trial in November 1968, said that when the McGee conscientious objector application was filed in 1966, he thought "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought" and that "what he set forth did not motivate me to grant him the relief he sought." He denied instructing the clerk to write that the conscientious objection claim had not been considered—a point on which the letter was ambiguous. He stated also that when the board gave McGee a I-A classification in 1967, "we again reviewed what appeared in the file," that

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9 So far as we have been able to determine, *United States* v. *McNeil*, 401 F.2d 527 (4 Cir. 1968), vacated and remanded for further consideration in the light of *McKart*, 395 U.S. 463 (1969), has not been again decided.

"we reviewed the record of the young man's case when we gave him the I-A and all pertinent information therein contained," and that "the board considered the whole file before it reclassified Mr. McGee I-A on September 19, 1967." While the chairman also testified that "based on our previous determination that his request for conscientious objection status was denied, we had no alternative at that time but to give him a I-A," we read this as meaning only that the chairman remembered the Board's dissatisfaction with McGee's showing when his application was examined in early 1966 and that the Board saw no reason to change their minds eighteen months later. Judge Murphy, who saw and heard the witness, found "as a fact that the draft board considered the defendant's application for a conscientious objector status and that was considered by the whole board on September 23." We do not see how this finding can be regarded as "clearly erroneous."

However, even if there had been an inadvertent failure to consider the conscientious objection claim in September 1967, as the dissent assumes, we would reach the same conclusion. This is precisely the kind of thing that a personal appearance or a conference with the Appeal Agent, which McGee was invited to have in the letter he returned unopened, would have been almost certain to reveal, with the result that the board would have passed on the merits of McGee's claim. Quite possibly it would have acted favorably; if it had not, the error would very likely have been corrected on appeal.[10] Despite their name, appeal boards do not perform simply a reviewing function. "It is universally held that the Appeal Board considers matters

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10 Communication between the appeal board and the local board could well have developed the true facts.

of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Local Board, and that any such prejudice on the local level is cured by a fair consideration on the appeal," *De Remer* v. *United States,* 340 F.2d 712, 719 (8 Cir. 1965) (citing cases). See 32 C.F.R. §1626.26; *McKart* v. *United States, supra,* 395 U.S. at 198 n. 16; *Storey* v. *United States,* 370 F.2d 255, 260 (9 Cir. 1966) (citing cases); *Clay* v. *United States,* 397 F.2d 901, 912-13 (5 Cir. 1968), *vacated and remanded on other grounds,* 394 U.S. 310 (1969); Note, *The Selective Service,* 76 Yale L.J. 160, 171 (1966). As already indicated, the fact that McGee had a good factual case for appeal in no way points against insistence on his taking one; a case of statutory construction like *McKart* differs since on such a matter there is a positive advantage in resort to the courts which alone can decide the issue authoritatively and uniformly for the benefit of all registrants. Instead McGee's stiff-necked refusal to have any dealings with the Selective Service System has caused the expenditure of countless hours by prosecutors, grand and petit jurors, and judges of the trial and appellate courts. If we were free to look at his case alone, we might still be tempted to take the charitable view of our dissenting brother. But if we should do that in McGee's case, we would be obliged to do it in every other similar one. Of course it seems "harsh" when the exhaustion requirement results in a conviction for refusal to submit to induction by a registrant with a seemingly good claim for exemption. But one of the main points of the exhaustion doctrine is to relieve the courts from having to consider claims that ought to be dealt with in the first instance by administrative agencies; it canot properly be limited to those persons whose claims would fail in court anyway.

While there are exceptions to the rule requiring a conscientious objector to appeal from a denial of his claim, none comes close to this case. Claimants are not required to exhaust administrative remedies in order to attack the constitutionality of the statute, *United States* v. *Sisson*, 294 F. Supp. 520 (D. Mass. 1968) (Wyzanski, *J.*), *probable jurisdiction noted*, —— U.S. —— (1969), or the regulations, *United States* v. *Branigan*, 299 F. Supp. 225, 233-36 (S.D.N.Y. 1969) (Weinfeld, *J.*), on the sensible ground that since local and appeal boards have no authority to determine constitutional claims, exhaustion would be a useless formality. Another qualification to the appeal requirement relates to "exceptional and unusual circumstances *underlying the failure to appeal*," *Thompson* v. *United States*, 380 F.2d 86, 88 (10 Cir. 1967) (emphasis added). But that line of cases holds only that neglecting to appeal is not a bar to judicial review of classification if the registrant's failure was justified. Examples are *Donato* v. *United States*, 302 F.2d 468 (9 Cir. 1962) (registrant received notice of classification while away on firefighting duties; by the time he returned the period for appeal had lapsed); *Glover* v. *United States*, 286 F.2d 84 (8 Cir. 1961) (registrant had unsuccessfully appealed a prior classification; when he received his fifth notice of classification, an exact duplicate of the fourth, there was no reason to expect him to go through the process again in the absence of an explanation from the board for the new notice);[11] *Powers* v. *Powers*, 400 F.2d 438 (5 Cir. 1968) (registrant given misinformation by the secretary of the local board regarding right to appeal); *United States* v. *Harris*, 302 F. Supp. 1194 (D. Ore. 1968) (registrant not charged with knowl-

11 The language from the opinion quoted in the dissent must be read in this context.

edge of right to appeal since he had little education and read with difficulty). The "exceptional circumstances" doctrine was recently reaffirmed and perhaps extended in *United States* v. *Davis*, 413 F.2d 148 (4 Cir. 1969), which held that the local board's failure to advise the registrant of the availability of a government appeal agent excused him from exhaustion: "If an Appeal Agent does nothing more than advise a registrant that he may lose his right to contest his classification when he is criminally prosecuted in the district court by failure to administratively appeal, it would seem to be worthwhile." But that cannot avail McGee who had advised the local board in no uncertain terms that he would not read anything they sent him, and would not have appealed no matter what he was told. While McGee's motives for taking this attitude may have been of the highest, they do not excuse his failure to seek the relief which the law afforded him. To countenance this would needlessly multiply the already heavy burden that cases like his are imposing on the courts.

IV.

We therefore affirm McGee's conviction on Count 1 for refusing to submit to induction. Since his claims with respect to Counts 2 and 3 hinge on the alleged impropriety of his I-A classification, we affirm the convictions on these counts also, without any need to consider what the proper result would be if we had held the I-A classification invalid. In light of the concurrent sentences there is no need to consider the conviction under Count 4 under the circumstances here presented.

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I respectfully dissent.

The Supreme Court has recently told us that "it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh." *McKart* v. *United States*, 395 U.S. 185, 197 (1969). This case shows how harsh that concept can be, particularly when—as here—it is applied unnecessarily. The record shows that there was apparently no basis in fact for denying the conscientious objector claim of Vincent Francis McGee, Jr. (as to this, we all agree), McGee presented his claim in timely fashion to his local draft board, and that body never passed on the merits of the claim. Despite this, the doctrine of exhaustion of remedies, born in the placid area of administrative law, is invoked thereby consigning McGee to jail for two years. That is too "harsh" for me.

As the majority opinion points out, McGee did present his I-O claim in full to his local board in February 1966. Examination of the record compels the conclusion that McGee's local board did not at that or any other time consider his I-O application on the merits. The board refused to consider his initial application for I-O on the ground that he was then a student, and eighteen months later, in September 1967, refused to classify McGee I-O on the ground that his claim had already been rejected.

32 C.F.R. §1623.2 requires that "the registrant shall be classified in the lowest class for which he is determined to be eligible." Since II-S (student deferment) is a lower class than I-O according to the hierarchy set forth in that regulation, it would have been improper for the board to grant McGee a I-O so long as he held a II-S, which he unquestionably did at the time he first presented his I-O claim. Thus it is difficult to understand the majority's

contention that the local board's letter to McGee dated March 23, 1966 was "ambiguous" on whether the I-O claim had been considered on the merits at that time. McGee then held a II-S classification. Under the regulation, therefore, consideration of the merits of McGee's I-O claim would have been a fruitless task for the board since it would in any event have been obliged to leave his II-S status unchanged. The letter itself advised McGee that "your claim as Conscientious Objector will be considered when you no longer qualify for a student classification"—in light of the regulation, that seems a statement of reason which is plain enough for me. And if there were any ambiguity left, the testimony of the board chairman resolves it in favor of the conclusion that in February-March 1966, McGee's I-O claim was not considered on the merits. While the majority correctly points out that the chairman testified that when the application was first filed in 1966, "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought," and that "what he set forth did not motivate me to grant him the relief he sought," he also testified that he rejected the application "at that time . . . *because the young man was attending college* and in my judgment he rated a 2S qualification which we proceeded to give him." (Emphasis added.) Almost immediately thereafter the following interchange took place:

> Q. I believe you said before that it was because of his beliefs that you failed to grant him a CO?
>
> A. I did not say anything at all about his beliefs. You can refer to the record. I said in my opinion what he set forth did not motivate me to grant him the relief he sought.

Then came the following interchange between the government attorney and the board chairman (Mr. Lande):

Mr. Robinson: Your Honor, I think Mr. Lande has testified that Mr. McGee was a student at that time and therefore they gave him a 2S classification.

The Witness: I did state that.

In light of the regulation, the letter received by McGee, and the board chairman's own testimony, the conclusion seems inescapable that when McGee applied for I-O in 1966 his claim was properly not considered on the merits, but was denied because he held a II-S classification at that time.

The record also indicates quite clearly that when McGee was classified I-A in September 1967, his I-O application was rejected on the ground that it had previously been considered and rejected, notwithstanding the fact that the initial rejection was not on the merits. It is true, as the majority points out, that the trial judge found that the local board "considered the defendant's application for a conscientious objector status and that was considered by the whole board on September 23," and also true that the chairman testified that the board "reviewed the record of the young man's case when we gave him the 1A and all pertinent information therein contained." However, he also testified as to the nature of that review:

> The Witness: To the best of my recollection . . . at that time [September 1967] the registrant was no longer in school. *Based on our previous determination that his request for conscientious objection status was denied,* we had no alternative at that time but to give him a 1A, which we did.
>
> Q. You didn't consider the conscientious objector claim again because it had been denied previously?
>
> A. Yes— [Emphasis added.]

Thus it is clear that the basis for denying I-O status in September 1967 was the previous denial in February-March 1966 when the application was first submitted. And, as already noted, the record is even clearer that this initial consideration in February-March 1966 did not deal with the merits of the application or the nature or sincerity of McGee's beliefs, but was based on the fact that he was a student with a II-S classification, who was not, for that reason, eligible for I-O status. At no time did the board pass on the merits of McGee's claim, even though, as the trial judge found, the application was "considered" by the board in September 1967.

The majority takes the position that "the chairman remembered the Board's dissatisfaction with McGee's showing when his application was examined in early 1966 and that the Board saw no reason to change their minds eighteen months later." However, the chairman did not testify concerning such memory. As noted, he did testify: "I did not say anything at all about his beliefs." Such an evaluation of McGee's beliefs was not necessary in February 1966 because McGee was then ineligible for I-O because of his II-S. Moreover, the chairman's testimony made clear that he did not discuss McGee's case with other members of the board in February 1966. In any event, the record establishes that neither the chairman alone nor the entire board ever considered whether McGee's beliefs were those of a sincere conscientious objector to war.

Such a failure to consider McGee's claim on the merits was a clear error by the local board, which one would think requires setting aside an order for induction. The board's failure was not only a blunder, but it also violated a selective service regulation, which commands it "to receive *and consider* all information, pertinent to the classification of a

registrant, presented to it," 32 C.F.R. §1622.1 (emphasis added), and undoubtedly violated the statute as well. E.g., 50 U.S.C. App. 455(a)(1):

> The selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe . . . .

Yet, we are told that the board's order should not be invalidated because McGee failed to utilize appellate remedies within the Selective Service System. I do not agree that we are required to invoke the doctrine of exhaustion in this case. It is true that *McKart, supra,* contains strong indications, quoted by the majority, that even the limited failure to exhaust present here may sometimes be fatal. But I do not read that case as necessarily and invariably preventing the defense of invalid classification when the registrant did give all the facts to the local board, especially where the record indicates that the local board applied no "expertise" in its ultimate decision and actually did not consider the classification on the merits at all. Compare *McKart, supra,* 395 U.S. at 198 n. 16. The language of *Glover* v. *United States,* 286 F.2d 84, 90-91 (8th Cir. 1961), may appropriately be applied to McGee's I-O claim:

> We adhere to the general rule as to the necessity for exhaustion of administrative remedies in order to obtain a judicial review, and are of the opinion that such rule is generally applicable and usually necessary. However, we are of the view that such general rule is not absolute, inflexible and without exception, but that it is to be relaxed only under extremely exceptional and unusual circumstances. The factual situa-

tion presented in this case is appropriate for and requires the relaxation of such rule.

Cf. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967).

The facts as to McGee's I-O claim are sufficiently unusual to allow us properly to depart from the exhaustion doctrine: McGee presented a strong case for a I-O classification; his local board did not require a personal interview as a prerequisite for processing such a claim; McGee's file contains no information reasonably contradicting his claim; the board chairman inaccurately thought that a letter in support of McGee advised the board that McGee would not accept a I-O; and when the board did "consider" the application, it dismissed it on the inaccurate assumption that the claim had already been rejected on the merits.

Finally, and perhaps most important, the failure of the local board to consider McGee's claim on the merits could not have been called to the attention of an appeal board because McGee could not know about that error and nothing in the record would disclose it. It is true that the appeal board might have reversed the denial of a I-O classification to McGee simply because it thought that he had made out a sufficient case. But that should not be dispositive in deciding whether to apply the exhaustion doctrine here. The appeal board might also have regarded the case, on the record as then known, as a close one which could go either way on the facts. Accordingly, even though review by the appeal board is *de novo*, the balance might have been tipped either way by a desire not to set aside the action of a local board. In such a case, a fair determination of the claim on the merits by the local board would be crucial. And, of course, that is precisely what McGee did

not get. In *Knox* v. *United States*, 200 F.2d 398, 402 (9th Cir. 1952), the Ninth Circuit met the argument that a *de novo* review by an appeal board cured the failure of the local board to consider evidence supporting a claim of conscientious objection. The court rejected that contention as follows:

> Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities.

This language in *Knox* has been cited with approval by the Ninth Circuit, most recently in *Welsh* v. *United States*, 404 F.2d 1078, 1083 (9th Cir. 1968), cert. granted, 396 U.S. 816 (1969), as well as by our own, *Mintz* v. *Howlett*, 207 F.2d 758, 762 (2d Cir. 1953), although we distinguished the latter case in *United States* v. *Corliss*, 280 F.2d 808, 816-18 (2d Cir.), cert. denied, 364 U.S. 884 (1960) (claim of procedural unfairness but not failure to consider on merits).

It is true that there are compelling reasons behind the exhaustion doctrine, and I do not suggest that the requirement be cast aside when the registrant ignores the local board altogether and gives it no facts at all. Nor is it necessary in this case to resolve the issue whether failure to appeal denial of a I-O claim should generally

be fatal at a subsequent criminal trial to the defense of invalidity of a I-A classification, a question which has recently split the Ninth Circuit, *Lockhart* v. *United States*, —— F.2d ——, 2 S.S.L.R. 3432 (9th Cir. 1969) (*in banc*) (8-2); cf. *United States* v. *Palmer*, 223 F.2d 893 (3d Cir.) (*in banc*) (4-3), cert. denied, 350 U.S. 873 (1955). I would hold only that the exhaustion doctrine need not be inexorably applied when the basic error of the local board could not be disclosed by the appeal, and should not be invoked when the registrant did give all of the pertinent information to the local board and it never passed upon the merits at all. On this record, McGee's failure to appeal from the board's I-A classification should not be fatal, and the exhaustion doctrine should not be applied to McGee. I would hold that he should have been classified I-O, and would set aside the conviction on Count 1.

The majority opinion had no occasion to consider the convictions on Counts 2 and 3, and did not find it necessary to deal with Count 4. However, since I would reverse the conviction on Count 1, it does seem necessary for me to consider the other counts, albeit very briefly.

Count 2 charged McGee with failing to report for his pre-induction physical examination in October 1967, after he had been reclassified I-A. It is undisputed that McGee did not report. However, he argues that had he received the I-O classification to which he was entitled, his failure to report could not constitute a crime. This contention is essentially correct. The Order to Report (SSS Form 223) which was sent to McGee by his local board quite clearly indicates to a I-O registrant that failure to report for a physical examination would not subject him to fine and imprisonment, as it would I-A and I-A-O registrants, and indeed would have no effect

at all on his obligation to perform civilian work.[1] Under those circumstances, the notice to a I-O registrant to report for a physical examination is for his benefit and is not a "duty required of him" under 50 U.S.C. App. §462 (a). See *United States* v. *Mendoza*, 295 F. Supp. 673, 683 (E.D.N.Y. 1969); *United States* v. *Walsh*, 279 F. Supp. 115, 118-19 (D. Mass. 1968). Cf. *Shoemaker* v. *United States*, 413 F.2d 274, 275 (9th Cir.), cert. denied, 396 U.S. 837 (1969). It is true that *McKart*, *supra*, 395 U.S. at 203, contains dicta suggesting that an invalid classification "would not be a defense today to a prosecution for failure to report for a pre-induction examination." However, *McKart* did not deal with the wrongful denial of a

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1 The Order to Report (SSS Form 223) states:

> To Class I-O Registrants:
>
> This examination is given for the purpose of determining whether you are qualified for military service. If you are found qualified, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service.

There is a sharp distinction in the advice the Form gives to a Class I-A and I-A-O registrant; he is told that:

> If you fail to report for examination as directed, you may be declared delinquent and ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

See also Local Board Memorandum No. 14, reported in S.S.L.R. 2160 (1969), which provides:

> 3. Action by Local Board Subsequent to Refusal of Its Own Registrants to Submit to Armed Forces Examination. . . .
>
> (b) If the registrant is in Class I-O, consider him for all purposes as if he had been physically and mentally examined and found acceptable for military service and process him thereafter in the same manner as any other registrant in Class I-O who has been found acceptable for service after being given an armed forces physical examination. . . .

I-O classification, and thus did not consider the option to waive a physical examination which is afforded to registrants holding such a classification. McGee should not be penalized because of the board's error, or deprived of the benefit of selective service procedures designed for conscientious objectors. Therefore, McGee's conviction on Count 2 should also be set aside.

Having thus concluded that because McGee was improperly denied classification as a conscientious objector he should have been acquitted on Counts 1 and 2 of the indictment, there remains a grave issue as to the proper treatment of his convictions on the remaining two counts. These charged that McGee knowingly failed to have in his personal possession a valid Notice of Classification (Count 3) and failed to submit information requested by his local board (Count 4). Appellant also attacks his conviction on these counts, but his arguments—particularly as to Count 3—are not very persuasive.

My problem is of a different sort. Having found error in Counts 1 and 2, I am left with the uneasy feeling that the case might have turned out differently if only Counts 3 and 4 had been involved. All of McGee's offenses grew out of the same operative fact: his policy of non-cooperation with his draft board starting in April 1967. Yet because of his earlier request, he was entitled to be classified I-O. If he had been so classified in September 1967—when he should have been—there is at least doubt that he would have become involved with the criminal law at all. It is true that he then would have been liable for civilian alternate service and presumably would have been ordered to report for it; we simply do not know whether, despite earlier contrary indications,[2] he would have obeyed such an order, which would have recognized the sincerity of

2 *Cf.* majority opinion, note 8.

his convictions. If he had, it is difficult to believe that prosecution on Counts 3 and 4 would have followed.[3] And, in any event, there is a substantial question whether the jury or the judge would have reacted differently to prosecution of a conscientious objector on Counts 3 and 4. Although the trial judge certainly acted within his authority when he sentenced McGee to concurrent two year terms, he might well have given McGee a shorter prison sentence, or even probation, had he known that McGee should have been classified as a conscientious objector and could not be convicted on Counts 1 and 2. I am aware that it is only

> on rare occasion that we have set aside a conviction on otherwise presumably "good" counts because of defects in the conviction of a defendant on "bad" counts.

United States ex rel. Weems v. *Follette*, 414 F.2d 417 (2d Cir. 1969); cf. *United States* v. *Bottone*, 365 F.2d 389, 394 (2d Cir.), cert. denied, 385 U.S. 974 (1966). This case is an appropriate instance for exercising such discretion. See *United States* v. *Barash*, 365 F.2d 395, 403 (2d Cir. 1966); *United States* v. *Hines*, 256 F.2d 561, 563 (2d Cir. 1958). Doing so would not only eliminate any doubt that McGee was prejudiced on Counts 3 and 4 by the invalid convictions on Counts 1 and 2, it would also afford the Government an opportunity to consider whether it still wishes to press the prosecution on Counts 3 and 4 against this conscientious objector and divinity student.

Accordingly, I would reverse the convictions on Counts 1 and 2 and direct a judgment of acquittal, and reverse the convictions on Counts 3 and 4 for further proceedings consistent with this dissenting opinion.

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3 Indeed, the Selective Service authorities in this case did not recommend prosecution on Count 4, even though McGee refused to obey the induction order. Gov't Exs. 39, 40.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

VINCENT FRANCIS MCGEE, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

A true copy,

A. Daniel Fusaro
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

Order Denying Rehearing

33568

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

VINCENT FRANCIS McGEE, JR.,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
J. JOSEPH SMITH
WILFRED FEINBERG
U.S. Circuit Judges

I dissent—

May 7, 1970.

A true copy,

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

Rehearing In Banc

33568

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

—v.—

VINCENT FRANCIS McGEE, JR.,

Defendant-Appellant

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

May 7, 1970

A true copy,

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS MCGEE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1970 (R. 15).[1] A petition for rehearing

[1] "R." refers to the numbers appearing on the initial pages of the various documents making up the record. "Tr." refers to the trial transcript (record document numbered 9).

with a suggestion of rehearing *en banc* (R. 16) was denied on May 7, 1970 (R. 17-18). On June 1, 1970, Mr. Justice Harlan extended petitioner's time for filing a petition for a writ of certiorari until July 6, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's failure to exhaust his administrative remedies by appealing from the local board's denial of his request for conscientious objector status precluded him from challenging the validity of the denial at his trial for refusal to submit to induction.

2. Whether petitioner can raise for the first time at his trial that he was improperly denied a ministerial student classification, having never requested the classification or even advised the board that he was a ministerial student.

3. Whether petitioner's conviction for failing to submit requested information to his board is valid and whether the court of appeals in any event properly concluded that there was no need to consider this count in view of the concurrent sentence.

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District of New York on all counts of a four-count indictment charging that he knowingly failed to submit to induction into the Armed Forces (count 1), report for a scheduled pre-induction physical exam-

ination (count 2), keep in his possession a valid notice of classification that had been sent him (count 3), and submit to his local board information that the board had requested (count 4), in violation of 50 U.S.C. App. 462(a) (R. 1; Tr. 299). On January 16, 1969, he was sentenced to two years' imprisonment on each count, the terms to run concurrently (R. 8). The court of appeals affirmed, one judge dissenting (Pet. App.).

Petitioner registered with his local Selective Service board in New York City in August 1961 and informed the board a month later that he was a student preparing for the ministry at Cathedral College of St. Joseph's Seminary, under the direction of the Roman Catholic Church. He took a leave of absence from the Cathedral College in 1963 and in September of that year he was classified I-A. In August 1964, he took and passed a pre-induction physical examination. Shortly thereafter he enrolled at the University of Rochester and was granted a II-S (student) deferment, which he retained until September 1967, except for a brief period in 1965 not here pertinent (Pet. App. 2a; R. 3, Exs. A and B).

In February 1966, petitioner wrote to his local board that he wished to declare himself a conscientious objector to war. The board sent him an SSS Form 150 (Special Form for Conscientious Objector) which petitioner completed and returned. In response to one of the questions in the form, he stated that, although he had left an official minor seminary of the Catholic Church, it was his intention, ultimately, to continue on to "actual ordained priesthood." In an attachment

to the form he added that he was conscientiously opposed not only to combatant and noncombatant military service, but also to "obligatory compensatory service in civilian work," and that he claimed exemption from such civilian service as well. On March 23, 1966, the board advised petitioner that the evidence he submitted had been reviewed and it was the decision of the board that the evidence did not justify a reopening of his case and reconsideration of his present (II-S) classification; however, he was told that his claim to CO status would be considered when he no longer qualified for a student deferment. Petitioner took no further action in the matter. In October 1966, he requested and was granted renewal of his II-S classification (Pet. App. 2a-3a; R. 3, Exs. C, D, E).

On April 15, 1967, while still classified II-S, petitioner wrote a letter to President Johnson, enclosing remnants of his torn and burnt registration certificate (SSS Form 2). He stated in the letter that although he had been "accepted for graduate study in a program where [he] would probably qualify for the theological deferment" he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy." Petitioner's local board received a copy of this letter, apparently considered reopening his classification but decided against it, and in any event did not change his II-S classification (Pet. App. 3a; R. 3, Exs. B, G).

In June 1967, petitioner graduated from the University of Rochester and the following month the

board sent him a Current Information Questionnaire (SSS Form 127) to fill out and submit. Petitioner returned the questionnaire unanswered and in an accompanying letter, dated July 23, 1967, advised the board that further correspondence from it would be returned unopened, "consistent with my belief that cooperation is approval of actions and policy which in conscience I can have nothing to do with." On September 19, 1967, petitioner was reclassified I-A. The following day the board mailed him a notice of this classification (SSS Form 110) and enclosed a letter informing petitioner that he had a right to request a personal appearance or to take an appeal within 30 days, that the board had a government appeal agent available to aid him with such appearance, appeal, or other procedural right, and that the appeal agent, or his representative, would give petitioner legal counsel on Selective Service matters at no charge. Petitioner returned the communication unopened, writing on the envelope: "Returned pursuant to previous declaration and notification" (Pet. App. 3a-4a; R. 3, Exs. B, J).

Petitioner also returned unopened an order directing him to report for a pre-induction examination on October 18, 1967; he did not report. On November 21, 1967, he was declared delinquent for that failure and a delinquency notice was sent him the following day. This too was returned unopened. On January 11, 1968, he was ordered to report for induction on January 29. On the scheduled date he reported for but refused to submit to induction (Pet. App. 4a; R. 3, Ex. B).

Meanwhile, on September 27, 1967, petitioner had matriculated at Union Theological Seminary, a non-denominational institution to which he had been recommended by his parish priest. However, he at no time requested a IV-D (ministerial student) classification from his local board, nor did he ever advise the board that he was attending the institution (Pet. App. 4a).

The chairman of petitioner's local board testified at a hearing held outside the presence of the jury that when petitioner's request for conscientious objector status was submitted to the board in February 1966, it was denied because petitioner, being then a student, was entitled to a II-S deferment (a lower classification than I-O) (Tr. 145, 156-161); that when petitioner, following his graduation from college, was reclassified I-A on September 19, 1967, the entire board participated in the decision (Tr. 162, 165, 171-175, 182); and that the board on that occasion reviewed all the pertinent information in his file (Tr. 175, 182). The trial judge found as a fact that in classifying petitioner I-A the board considered his request for CO status (Tr. 301).

ARGUMENT

1. Petitioner's failure to exhaust his administrative remedies by appealing from the local board's denial of his request for conscientious objector status precluded, contrary to his principal contention in this Court (Pet. 12-19), a subsequent challenge at his trial to the validity of the board's classification. *McKart* v. *United States*, 395 U.S. 185, did not abro-

gate generally the long established rule that except in rare cases involving most unusual circumstances[2] a registrant's disregard of administrative appellate processes prevents him from challenging his classification in the courts.[3] In that case the Court relaxed the principle in situations where the question on which classification depends—*i.e.* the meaning of the "sole surviving son" exemption of 50 U.S.C. App. 456(o)—is "solely one of statutory interpretation" (395 U.S. at 197-198). It carefully noted, however, that the holding did "not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System" (395 U.S. at 200). Indeed, the Court specifically excepted from the *McKart* decision the failure of a registrant to pursue an appeal where the assessment of his claim to exemption or deferment status requires "expertise or the exercise of discretion, both by the local boards and the appeal boards" (395 U.S. at 198, 200). Significantly, the Court expressly mentioned conscien-

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[2] Cf. *Donato* v. *United States*, 302 F. 2d 468, 470 (C.A. 9) (appeal not taken due to circumstances beyond registrant's control).

[3] See, *e.g.*, among the more recent decisions, *Edwards* v. *United States*, 395 F. 2d 453, 454 (C.A. 9), certiorari denied, 393 U.S. 845; *Kidd* v. *United States*, 386 F.2d 422, 423 (C.A. 10); *United States* v. *Kurki*, 384 F. 2d 905, 907 (C.A. 7), certiorari denied, 390 U.S. 926; *Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Noland* v. *United States*, 380 F. 2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945. Cf. *Cox* v. *United States*, 332 U.S. 442, 445, 448; *Sunal* v. *Large*, 332 U.S. 174, 176; *Gibson* v. *United States*, 329 U.S. 338, 349-350; *Estep* v. *United States*, 327 U.S. 114, 123; *Billings* v. *Truesdell*, 321 U.S. 542, 558; *Falbo* v. *United States*, 320 U.S. 549.

tious objector claims as examples of the kind of claims to which the decision generally did not apply (395 U.S. at 198 n. 16, 201).

Thus, irrespective of whether petitioner's local board passed on the merits of his conscientious objector claim when it reclassified him I-A in September 1967 (the sole issue on which the court below was divided[4]), petitioner's failure to pursue his appellate remedies precluded him from contesting the validity of his classification at his trial. For Selective Service appeal boards, as the court below noted (Pet. App. 15a), do not perform simply a reviewing function. Like local boards, they classify *de novo*. *DeRemer* v. *United States*, 340 F.2d 712, 719 (C.A. 8). This alone is a sufficient response to the dissenting judge's concern below that in a "close" case the balance might be "tipped either way" at the appellate stage "by a desire not to set aside the action of" the local board (Pet. App. 24a). The essential point of *de novo* consideration is that the reviewing body makes a fresh appraisal of the registrant's claim without regard to whether its decision accords with the original action taken by the local board. Petitioner's deliberate bypassing of the appeal procedure afforded him under the regulations denied the Selective Service System an opportunity fully to reexamine his file to determine if any error may have occurred; he thus fore-

[4] As appears from the opinions below, the chairman's testimony was somewhat ambiguous on this issue. As the majority noted (Pet. App. 15a), the trial judge, who saw and heard the witness, found as a fact that the board considered the request for C.O. status when it reclassified petitioner in 1967 (Tr. 301).

closed himself from challenging his classification in a subsequent criminal prosecution. Cf. *Lockhart* v. *United States*, 420 F.2d 1143 (C.A. 9) (*en banc*), decided after *McKart*, where even the dissenting judges recognized the appropriateness of applying the exhaustion doctrine in situations where the registrant "has deliberately sought to subvert and evade the administrative process" and his default was not "merely inadvertent or negligent" (420 F.2d at 1155).

United States v. *Davis*, 413 F.2d 148 (C.A. 4), relied on by petitioner (Pet. 13-14, 19), does not conflict with the decision below. There the local board did not comply with its duty to advise the registrant of the availability of a government appeal agent to apprise him of his rights, including the right of appeal (413 F.2d 149-150). Accordingly, the court held that *Davis* came within the rule that "special circumstances may excuse the registrant from the ordinary consequences of his failure to administratively appeal" (*id.* at 151; see *supra*, pp. 6-7). Here the notice found wanting in *Davis* was contained in the communication which the local board sent to petitioner when he was reclassified I-A and which petitioner returned to the board unopened (*supra*, p. 5). *Davis*, thus, as the court below noted, cannot avail petitioner, "who had advised the local board in no uncertain terms that he would not read anything they sent him, and would not have appealed no matter what he was told" (Pet. App. 18a).[5]

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[5] Petitioner's reliance on *McNeil* v. *United States*, 395 U.S. 463 (remanding *United States* v. *McNeil*, 401 F. 2d 527 (C.A. 4), to the United States District Court for the Eastern Dis-

2. Petitioner's contention that he was erroneously denied a IV-D (ministerial student) classification on the basis of his matriculation at Union Theological Seminary in September 1967, a few months before he was ordered to report for induction (Pet. 19-26), is without merit. This argument is fully answered in the majority's opinion of the court of appeals on which we rely here (Pet. App. 5a-10a).[6] We stress only that petitioner not only never requested the exemption he now says was improperly denied him, but, indeed, he never even advised the board that he was attending the institution in question, a matter of importance because of the factual issues as to whether

---

trict of Virginia for further consideration in light of *McKart*), is also misplaced. While that case involved the denial of a conscientious objector claim—*i.e.*, one of the kinds of claim which the Court declared was generally not to be governed by *McKart*—we point out that *McKart* did not indicate that the failure by a CO claimant to exhaust his administrative remedies could *never* be excused. Instead, it merely noted that different considerations were applicable to such claims and left to future cases further delineation of the governing principles. It was natural, therefore, since *McNeil* was pending before this Court when *McKart* was decided, to remand the case for reconsideration in light of the pertinent discussion in *McKart*. Moreover, in its memorandum to this Court in *McNeil*, the government had pointed out that, contrary to the court of appeals' assumption in that case, it was possible that the registrant had adequately noted his wish to appeal, so that disposition of the case under the failure-to-exhaust-remedies rationale might in any event have been inappropriate (Memorandum for the United States, No. 1048 Misc., October Term, 1968 pp. 5-6). The government, therefore, itself suggested the necessity of remand.

[6] The dissent below did not disagree with the majority on this issue.

petitioner's studies were under the requisite religious auspices. Cf. *McKart* v. *United States*, *supra*, 395 U.S. at 198 n. 15; *Dickinson* v. *United States*, 346 U.S. 389, 395.[7]

3. Petitioner's challenge to his conviction on count 4—for failing to submit requested information to his local board (in the Current Information Questionnaire mailed him in July 1967) (Pet. 27-29)—is also untenable. He argues that any information he might have supplied would have been beneficial rather than detrimental to him from the standpoint of his liability to induction (Pet. 28-29). But, even if so, the fact is irrelevant. The regulation imposing the duty which petitioner violated is categorical in its terms and does not make compliance conditional on the character of the information withheld (32 C.F.R. 1641.7(b)). Petitioner contends that it was error for the court to instruct the jury that it could find the

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[7] Petitioner's contentions with respect to his convictions on counts 2 and 3—for failing to report for his ordered physical examination and for failing to possess a valid classification notice (Pet. 26-27)—presuppose the invalidity of his I-A classification. Since his challenges to that classification are untenable for the reasons we have stated, there is no occasion to consider the contentions respecting these counts. See, moreover, as to count 2, this Court's observation in *McKart* v. *United States*, *supra*, 395 U.S. at 203, that "[a]n invalid classification * * * would not be a defense today to a prosecution for failure to report for a pre-induction examination." In any event, petitioner's sentences on counts 2 and 3 run concurrently with his sentence on count 1 (refusal to submit to induction), and, therefore, for this additional and independent reason, there is no warrant for further review of the convictions on those counts. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

requisite intent under this count merely by determining that he knowingly failed to return the questionnaire; he asserts that the jury should have been instructed that it must determine whether the information sought by the board was in fact already in its possession (Pet. 27-28). While we believe that there is no merit to this argument, it is enough for present purposes to point out that petitioner failed to object to the criticized instruction when it was given or to request the instruction which he now says should have been given (Tr. 245-247, 293-296). He is consequently foreclosed from raising the points here. Rule 30, F. R. Crim. P. Since, at all events, petitioner's sentence on this count, like his sentences on counts 2 and 3 (see fn. 7, *supra*), were ordered to run concurrently with his sentence on the principal count, the court of appeals, in its discretion, could properly conclude (Pet. App. 18a) that as a matter of judicial convenience there was no need to consider the count 4 conviction. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

Recent decisions in the Fourth and Fifth Circuits concerning the application of the exhaustion of administrative remedies doctrine are in direct conflict with the decision below.

Petitioner respectfully brings to the Court's attention two recent circuit court decisions. *United States* v. *Davila*, —— F.2d ——, 3 SSLR 3089 (5th Cir., July 1, 1970), although decided before the filing on July 6, 1970 of the petition in this case, was still not reported at that time. *United States of America* v. *Eades*, —— F.2d —— (4th Cir., August 5, 1970), was decided after the filing of the petition.

Both cases held the application of the exhaustion requirement inappropriate where the local board, because of an erroneous view of the law, and on an undisputed set of facts, has acted without a basis in fact by denying a

conscientious objector classification for which a registrant has made out a prima facie case. The majority below rejected this position.

In *Eades,* the registrant's conviction for failure to submit to induction was reversed. The court stated that the registrant made a prima facie case for conscientious objector status and that his failure to exhaust administrative remedies was no bar to raising his defense of invalid classification. In effect, the court said that the district court should have determined whether a basis in fact existed for the registrant's classification, whether or not the registrant had appealed his classification through the administrative process.

In *Davila,* the registrant's conviction for refusal to submit to induction was also reversed. The court stated that the registrant had presented a prima facie case for conscientious objector status and that his local board had acted without a basis in fact in denying his claim. In answer to the Government's argument that the court could not reach the issue of basis in fact because the registrant had failed to exhaust his administrative remedies, the court, citing *McKart* v. *United States,* 395 U.S. 185 (1969), stated that the exhaustion requirement was no longer an absolute bar to judicial review.

The court then cited the Supreme Court's disposition of the petition for certiorari in *United States* v. *McNeil,* 395 U.S. 463 (1969), a case cited in the instant petition.

> "The Supreme Court left open the possibility that a defense of wrongful failure to grant conscientious objector status might not be barred for failure to exhaust in an appropriate case, even though the registrant's

claim is in a category which requires the exercise of discretion by the Selective Service System. On the same day it decided *McKart*, it vacated the judgment in United States v. McNeil, 401 F.2d 527 (4th Cir. 1968) and remanded to the District Court for further consideration in the light of *McKart*. 395 U.S. 463, 23 L.Ed. 2d 446 (1969). The Court of Appeals had held that McNeil was exhaustion-barred from questioning in the trial Court the denial of his claims for conscientious objector and ministerial exemptions." *United States* v. *Davila*, 3 SSLR at 3091, n. 4.

The court also noted that an appeal board can bring no special expertise to bear on the question of whether or not a registrant has made out a prima facie case for conscientious objector classification where his file reveals no facts refuting his conscientious objection claim and that judicial review in such cases would not disrupt the administrative process.

As all three judges below agreed, there was no basis in fact for the denial of petitioner's claim for exemption as a conscientious objector.

In light of the decisions in *Eades* and *Davila*, the exhaustion rule should not be applied to petitioner to prevent judicial review of the legality of his classification and denial of conscientious objector status.

CONCLUSION

Certiorari should be granted because the decision below is in clear conflict with decisions of the Fourth and Fifth Circuits.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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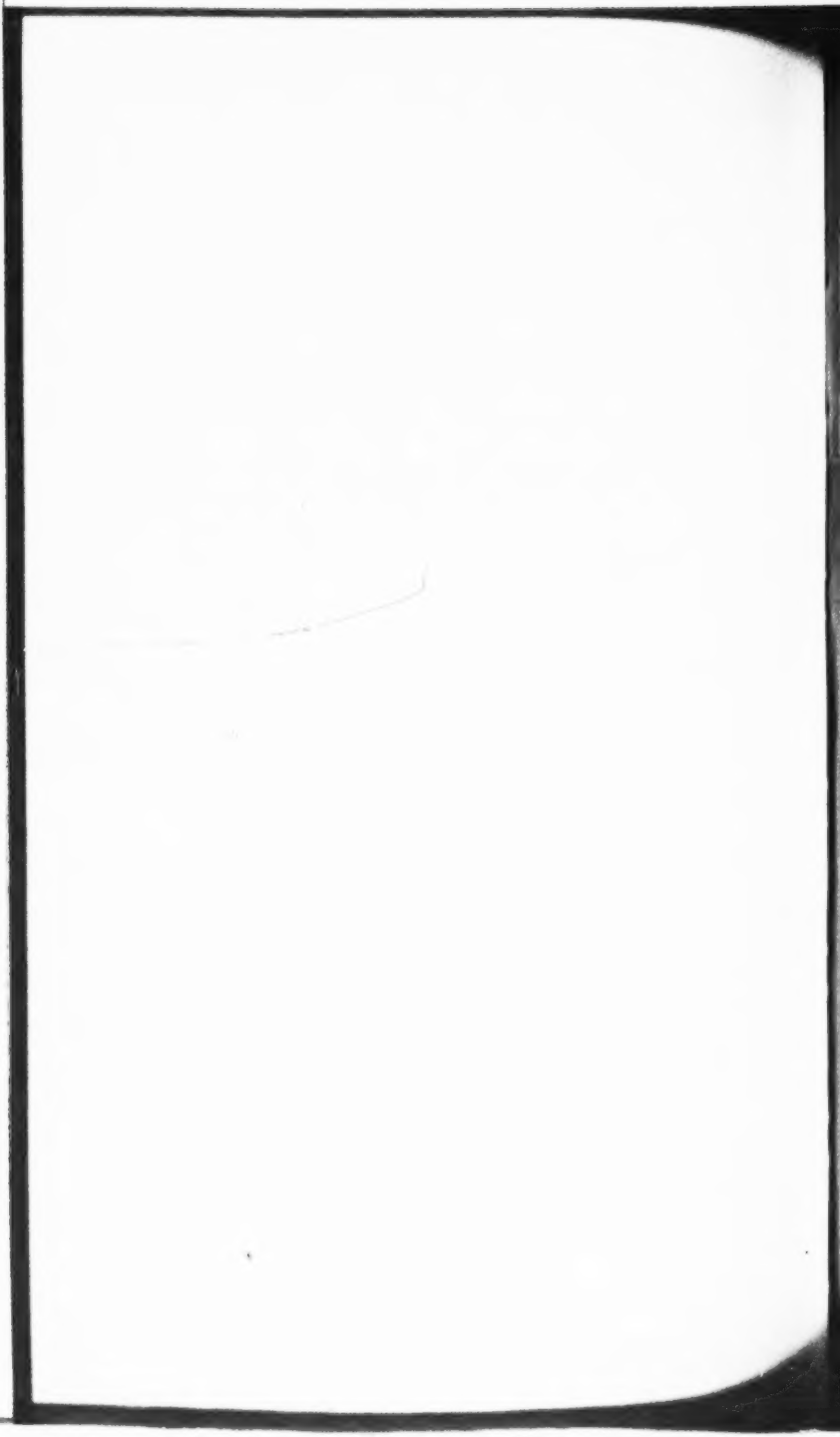

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IN THE

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VINCENT FRANCIS McGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals is reported at 426 F.2d 691 and is set out in the Appendix at A. 61. The dissenting opinion of Circuit Judge Feinberg is reported at 426 F.2d at 700 and appears in the Appendix at A. 79.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1970 (A. 90-91). On May 7, 1970, the Court of Appeals denied petitioner's motion for rehearing or rehearing *in banc* (A. 92-93). On June 1, 1970, Mr. Justice Harlan

issued an order extending the time within which to file a petition for writ of certiorari to July 6, 1970. The petition for certiorari was filed on July 6, 1970 and certiorari was granted on October 19, 1970 (A. 94). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutes and Regulations Involved

MILITARY SELECTIVE SERVICE ACT OF 1967, 50 U.S.C. APP.

Section 456(g) Regular or duly ordained ministers of religion . . . and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service (but not from registration) under this title. . . .

Section 456(j) *Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Section 460(b)(3). No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal

boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 462 *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

SELECTIVE SERVICE REGULATIONS

32 C.F.R.

§1622.1 . . .

(c) . . . . The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local

board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

§1622.10 . . .

In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class.

§1622.25 . . .

(a) In Class II-S shall be placed any registrant who has requested such deferment. . . .

§1622.43 . . .

(a) In Class IV-D shall be placed any registrant . . .

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school. . . .

§1623.1 . . .

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; provided, that the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classification Questionnaire (SSS Form No. 100) within the time allowed by §1621.10 of this chapter, or (2) he fails to provide

the local board with any other information concerning his status which he is requested or required to furnish. . . .

§1623.2 . . .

Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible. . . .

§1623.5 . . .

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. . . .

§1628.11 . . .

(b) . . . the local board shall mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to registrants who have been classified in Class I-A, Class I-A-O, and Class I-O. . . .

(c) The local board may also mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to any registrant who is classified in a class other than Class I-A, Class I-A-O, or Class I-O if it determines that his induction may shortly occur. . . .

§1641.2 . . .

(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the

required time, he shall be deemed to have waived the right or privilege.

LOCAL BOARD MEMORANDUM No. 14

SUBJECT: PROCEDURES TO BE FOLLOWED WHEN REGISTRANT REFUSES TO SUBMIT TO PHYSICAL EXAMINATION OR MENTAL TEST, OR FAILS TO REPORT FOR OR SUBMIT TO INDUCTION

3. *Action by Local Board Subsequent to Refusal of Its Own Registrants to Submit to Armed Forces Examination.* —Whenever the local board receives its own registrant's records with a letter of transmittal stating in detail the refusal of the registrant to submit to the physical examination or mental test, or any part thereof, from the joint examining and induction station or from the local board to which the registrant was transferred for armed forces physical examination, it shall proceed as follows:

(a) Retain the registrant in Class I-A, Class I-A-O, or Class I-O, as the case may be.

(b) If the registrant is in Class I-O, consider him for all purposes as if he had been physically and mentally examined and found acceptable for military service and process him thereafter in the same manner as any other registrant in Class I-O who has been found acceptable for service after being given an armed forces physical examination.

LOCAL BOARD MEMORANDUM No. 56

SUBJECT: CLASSIFICATION OF DIVINITY STUDENTS.

4. *Responsibility of Local Board and Information Required.*

(b) To substantiate the claim of a registrant that he is a theological student, the local board must require him to furnish evidence which clearly establishes to the satisfaction of the local board that the registrant meets both of the following requirements:

(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and

(2) He is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school.

(c) To substantiate the claim of a registrant that he is a pretheological student, the local board must require him to furnish evidence which clearly establishes to the satisfaction of the local board that the registrant meets both the following requirements:

(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and

(2) He is satisfactorily pursuing a full-time course of instruction leading to his entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(d) The local board may require from the church, religious organization, or school detailed information in order to determine whether or not the theological or divinity school is in fact a recognized school and whether or not the church or religious organization which is sponsoring the registrant is recognized.

5. *Assistance Available to Local Board.*—If the local board considers the information it has received to be insufficient for the purpose of making a determination, it should request assistance or additional information from the State Director of Selective Service. . . .

Questions Presented

1. Whether the exhaustion of administrative remedies doctrine should be applied when there is no basis in fact for denying a registrant an exemption for which he has applied, especially when a fundamental procedural error committed by the local board could not have been disclosed by the registrant's appeal through the administrative process.

2. Whether a registrant who meets every qualification for the statutory exemption as a divinity student may be denied a IV-D classification because he does not request that classification from his local board.

3. Whether a registrant may be convicted for failure to report for a physical examination when, if properly classified, he could not have been lawfully ordered to report or, if ordered to report, he could have waived the examination without penalty.

4. Whether a registrant who is unlawfully classified may be convicted for failing to possess a Notice of Classification (SSS Form 110) which reflects the unlawful classification.

5. Whether a registrant's conviction for failure to submit certain information to a local board can stand if the judge charges that the jury can find the defendant guilty if he failed to complete a questionnaire, thereby precluding the jury from determining whether he did supply the requested information in some other manner.

6. Whether a conviction for failure to submit certain information to a local board can stand if the registrant substantially complied with the information-giving requirements of the Selective Service Regulations.

7. Whether petitioner's convictions on two minor counts should be allowed to stand in light of the fact that, if petitioner had been properly classified, the prosecution on these counts might not have been brought or, if brought, might have resulted in a different verdict or sentence.

Statement of the Case

Petitioner is a Roman Catholic who, at the time he was ordered to report for induction, was a student at the Union Theological Seminary in New York City (A. 42). He registered with Local Board 15 in Manhattan in August 1961 and informed the board a month later that he was "a student preparing for the ministry at the Cathedral College of St. Joseph's Seminary . . . under the direction of the Roman Catholic Church" (Govt. Ex. 3, A. 44). After

enrolling in the University of Rochester, he was granted a II-S (student) deferment. In February 1966, while still classified II-S, petitioner applied for conscientious objector status, stating that it was his "intention to continue on to actual ordained Priesthood." The clerk of his board wrote him on March 23:

> "This will advise that the recent evidence submitted concerning your case has been reviewed by the Local Board. It is the decision of the Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.
>
> However, we wish to advise that your claim as Conscientious Objector will be considered when you no longer qualify for a student classification" (Govt. Ex. 18, A. 26, 63).

In explaining this letter, the board chairman testified at trial that he rejected the application because "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought" (A. 26), and that "what he set forth did not motivate me to grant him the relief he sought" (A. 27). He added that he also rejected the application "at that time . . . because the young man was attending college and in my judgment he rated a 2S qualification which we proceeded to give him" (A. 27).

Petitioner later requested and was granted a further II-S classification in October 1966.

In April 1967, while still classified II-S and enrolled in the University of Rochester, petitioner wrote President Johnson, enclosing remnants of his torn and burnt draft card. This letter stated that even though he had "already

been accepted for graduate study in a program where" he "would probably qualify for theological deferment," he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy" (Govt. Ex. 25, A. 50). A copy of this letter was forwarded to the Selective Service System (A. 39, 63) and, on April 26, 1967, to petitioner's local board (Govt. Ex. 25, A. 50).

In May 1967 petitioner was interrogated by two FBI agents, at which time he told them that he had been accepted for admission to Union Theological Seminary, that he would begin studies there in September of that year, and that one of his mailing addresses would be the dormitory at the Seminary (A. 24-25). At trial a third agent testified somewhat ambiguously of a conversation with a board clerk on May 19, 1967, during which he asked her if petitioner's present classification would be changed if he were to attend Union Theological Seminary (A. 20-21).

After petitioner's graduation from the University of Rochester in June 1967, his board sent him a Current Information Questionnaire (SSS Form 127). Petitioner returned it unanswered and in a covering letter announced that "further correspondence," from the draft board would "simply be returned unopened," consistent with his belief that "cooperation is approval" (Govt. Ex. 33, A. 54). On September 19, 1967, petitioner was reclassified I-A, notwithstanding his still pending application for conscientious objector status.

The board chairman's testimony at trial regarding petitioner's application was contradictory. At one point he said that the Board "reviewed the record of the young

man's case when we gave him the I-A and all pertinent information therein contained" (A. 37). At another point he said, "Based on our previous determination that his request for conscientious objector status was denied, we had no alternative at that time but to give him a I-A, which we did" (A. 35).

In any case, the Board mailed him a notice of classification (SSS Form 110) and a letter informing him that he had a right to ask for a personal appearance or an appeal within 30 days. Petitioner returned the envelope unopened, writing on the outside:

> "Returned pursuant to previous declaration and notification" (A. 64).

Petitioner matriculated at Union Theological Seminary as a full-time student on September 27, 1967. Subsequently, petitioner returned unopened an order directing him to appear for a physical examination scheduled for October 18, 1967, and did not appear for it. He was declared delinquent on November 21, 1967, and returned a delinquency notice sent the next day.

While petitioner did not make formal written request for a IV-D (divinity student) classification from his draft board, he again had occasion to advise the government of his attendance at Union. In November 1967, petitioner testified before a federal grand jury investigating Selective Service violations and explicitly stated that he was a divinity student at Union studying for the Roman Catholic priesthood (A. 39). The grand jury was convened in the Southern District of New York, and the questioning of petitioner was conducted by John Robinson, the same

Assistant United States Attorney who later brought petitioner's indictments and prosecuted the case in the trial court.

On January 11, 1968, only a few weeks after his grand jury appearance and while still at Union, petitioner was ordered to report for induction on January 29, 1968. He did report, filled out various forms soliciting a broad range of information, underwent a complete physical examination, and was found acceptable for service. He then refused to submit to induction, again stating his moral and religious objections to military service.

Petitioner's Selective Service file was then forwarded to the United States Attorney with a notation that the New York City Director of Selective Service recommended prosecution only on the charges of refusing induction and non-possession of a draft card (Govt. Ex. 39, A. 58-59). Nevertheless, the government sought a four-count indictment.

Petitioner was indicted on February 29, 1968 and charged with refusal to submit to induction (Count One), refusal to report for a physical examination (Count Two), failure to have in his personal possession a valid notice of classification (Count Three), and failure to submit certain requested information (Count Four), all in violation of Title 50, App., U.S.C. §462(a) and various selective service regulations. Petitioner moved to dismiss the indictment on various constitutional and statutory grounds. The motion was denied on June 13, 1968 by Judge Edmund L. Palmieri on the ground that it presented factual matters which had to be resolved at trial (A. 7-16).

Petitioner was tried before a jury. At the conclusion of the trial, Judge Thomas F. Murphy made findings that (1) petitioner, at the time of refusing induction, was pursuing a full-time course of instruction at Union Theological Seminary, a recognized theological divinity school; (2) Union was a non-denominational school not under the direction of a recognized church or religious organization, and (3) petitioner's local board had considered his application for conscientious objector status in September 1967 (A. 41-42).

Petitioner was found guilty on all four counts, and on January 16, 1969, was sentenced by Judge Murphy to two years on each count, the sentences to run concurrently.

Petitioner's conviction was affirmed by the Court of Appeals, Circuit Judge Feinberg dissenting, on March 31, 1970. The majority, although holding that consideration of petitioner's claims for exemption as a divinity student and as a conscientious objector was barred by his failure to appeal his I-A classification, agreed with Judge Feinberg that the local board lacked a "basis in fact" for denying the conscientious objector claim (A. 71-72). Judge Feinberg said that petitioner should have been classified I-O and that the exhaustion doctrine should not have been applied to petitioner's failure to appeal from his I-A classification (A. 83-86). His position was that convictions on Counts One and Two should have been reversed and a judgment of acquittal directed on the basis of the improper classification and that convictions on Counts Three and Four should have been reversed and remanded for reconsideration (A. 89).

Summary of Argument

In 1961, when Vincent McGee, Jr. registered for the draft, he told his local board that he was studying for the Catholic priesthood. For the next several years he pursued that goal and in the fall of 1967 he entered Union Theological Seminary. By virtue of a Congressional exemption for divinity students and ministers, he enjoyed the prospect of remaining free of military service. But approximately five months after entering Union, petitioner was indicted on four counts of violating the Military Selective Service Act of 1967.

Petitioner had applied for conscientious objector status while still in college. But before his board could act on his application, he concluded, in the spring of 1967, that he must "sever every link with violence and war." So he wrote the President of the United States in order to express "the fundamental belief that man must build and not destroy, love and not hate." He said that he would no longer cooperate with Selective Service, but hoped instead to "follow the words of the Pope at the United Nations, 'War, never again'" (Govt. Ex. 25, A. 50). Subsequently, his board rejected his conscientious objector claim wholly without basis. He did not request exemption as a divinity student.

The government responded intemperately to McGee's non-cooperation. For assuming the profound moral posture of refusing to cooperate with the machinery for selecting men to go to war, McGee was prosecuted on four separate charges carrying a maximum liability of 20 years imprisonment and $40,000 fine. The Selective Service System itself recommended prosecution on only two counts. Had McGee

arrived at his position when he was 18 and simply refused to register, he could only have been prosecuted on a single charge.

The government's zeal in this case led it to seek a four-count indictment despite specific knowledge that the defendant was entitled to a statutory exemption from military service. The majority below considered petitioner's position "stiff-necked" (A. 76) and upheld a conviction on four counts simply because he declined to appeal the local board's action. This despite the court's finding that petitioner should have been classified as a conscientious objector.

I.

The court below improperly applied the exhaustion doctrine to petitioner's claim for conscientious objector status.

Although the court below agreed that petitioner was unlawfully denied conscientious objector status, his conviction on Count One was upheld because he failed to exhaust his administrative remedies. That result misconstrues this Court's decision in *McKart* v. *United States,* 395 U.S. 185 (1969).

The exhaustion doctrine evolved in the context of affirmative litigation where its effect was merely to delay relief. It is improperly applied in a defensive context, particularly criminal prosecutions, where the administrative process is at an end and the effect of the rule is to permanently deny relief. *Estep* v. *United States,* 327 U.S. 114, 128-29 (1946) (Murphy, J., concurring). The requirement of exhaustion is generally relaxed in at least two situations: where the

agency has exceeded its jurisdiction or has violated a statutorily granted right. See generally, Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 *Geo. L.J.* 315 (1967). Both situations were present here. Thus the petitioner's claim should have been considered despite the failure to exhaust.

This Court has not permitted agency rules to abridge fundamental rights. *Greene* v. *McElroy,* 360 U.S. 474 (1959). Similarly, courts should not impose judge-made rules such as the exhaustion doctrine to limit rights in defense to enforcement proceedings, such as criminal prosecutions, without specific mandate from Congress. *Smith* v. *United States,* 199 F.2d 377 (1st Cir. 1952); cf. *Yakus* v. *United States,* 321 U.S. 414 (1944). Congress has not required exhaustion of administrative remedies as a condition of defending a criminal prosecution under the Military Selective Service Act of 1967.

Exhaustion is not required by this Court's ruling in *McKart* where a court is asked to review the misapplication of a legal standard by a local board to an undisputed set of facts. *United States* v. *Davila,* 429 F.2d 481 (5th Cir. 1970).

As Judge Feinberg demonstrated in dissent, the local board never considered petitioner's conscientious objector application on its merits. This fundamentally lawless action by the local board, *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968), is particular justification for relaxation of the exhaustion requirement.

II.

As a full-time student at Union Theological Seminary studying for the priesthood under the direction of the Roman Catholic Church, petitioner was entitled to a IV-D classification despite his failure to request the classification from his local board.

Despite his failure to request exemption as a divinity student, §6(g) of the Act mandates exemption of those who qualify. Petitioner qualified for the exemption and conveyed that information to the President of the United States, to FBI agents investigating Selective Service violations and to the Assistant United States Attorney who prosecuted him. Petitioner's local board knew of his likely eligibility for the exemption. Despite that knowledge the board ordered him to report for induction and the Assistant United States Attorney sought these indictments.

The notice which the government had of petitioner's eligibility for the exemption was sufficient without a specific claim being made to the board. *United States* v. *Holmes*, 426 F.2d 915 (2d Cir. 1970).

III.

The conviction on Count Two for failure to report for a physical examination cannot stand because it was a direct result of petitioner's unlawful classification.

Had petitioner been classified I-O as a conscientious objector, he could have been lawfully called for a physical examination, but his failure to report would not have been criminal. *Shoemaker* v. *United States*, 413 F.2d 274 (9th Cir. 1969); Local Board Memorandum No. 14.

Had petitioner been classified IV-D, he would not have been in a class which could have been lawfully ordered to report for induction. 32 C.F.R. 1628.11(c).

IV.

Since petitioner was improperly classified I-A, he was not guilty of failing to posses a *valid* Notice of Classification.

32 C.F.R. 1623.5 requires a registrant to have in his possession a "valid" Notice of Classification. Count Three charged petitioner with failing to possess the I-A classification card mailed to him in September 1967. Since petitioner should properly have been classified I-O or IV-D, that card was not a valid one and his failure to possess it violated no lawful duty. *United States* v. *Hertlein,* 143 F. Supp. 742 (E.D. Wis. 1956).

V.

The conviction on Count Four cannot stand because petitioner substantially complied with the requirement that he submit the information requested by his board.

Petitioner was charged in Count Four with failing to provide certain information requested by his local board. Petitioner substantially complied with that request. Nevertheless, the trial judge improperly instructed the jury that a finding that petitioner merely failed to return a questionnaire, rather than failed during a period of time to provide certain information, would support a conviction on this count. *Bollenbach* v. *United States,* 326 U.S. 607, 613 (1946).

Petitioner substantially complied with the only duty he owed the board by giving them sufficient information to classify him I-A. He was not obliged to provide the board with information justifying another classification. 32 C.F.R. 1622.1(c), 1622.10 and 1623.1(b); *United States* v. *Rubinstein*, 166 F.2d 249 (2d Cir. 1948) (Hand and Swan, JJ., concurring).

VI.

If this Court does not direct a judgment of acquittal on Counts Three and Four, the Court should reverse the convictions on those counts and remand to the trial court so that the government may determine whether it wishes to press the prosecution on those counts alone.

Judge Feinberg, dissenting from the judgment below, urged reversal and entry of a judgment of acquittal on Counts One and Two and reversal of the convictions on two of the minor counts of the indictment, Counts Three and Four. He suggested a remand to the trial court in order for the government to reconsider the prosecutions on those counts. He suggested also that the trial judge may have imposed a shorter sentence on those counts if he realized that petitioner should have been granted an exemption by his local board.

ARGUMENT

I.

The court below improperly applied the exhaustion doctrine to petitioner's claim for conscientious objector status.

The majority opinion and dissent below agreed on at least one point: petitioner was denied conscientious objector status by his local board without a basis in fact (A. 71-72, 79). Petitioner's conviction and two year jail sentence for violation of a concededly unlawful induction order was sustained because he failed to exhaust his administrative remedies. That result was premised upon a misapprehension of the exhaustion doctrine and an unnecessarily restrictive reading of *McKart* v. *United States*, 395 U.S. 185 (1969).

In *McKart* this Court re-examined for the first time in twenty-three years the requirement that a defendant in a criminal prosecution for violation of the selective service law must have exhausted all of the administrative remedies available to him in order to attack the legality of his classification. That requirement in draft cases emerged from the first two cases to reach this Court under the Selective Training and Service Act of 1940, 54 Stat. 835, 50 U.S.C. App. §301, *Falbo* v. *United States*, 320 U.S. 549 (1944), and *Estep* v. *United States*, 327 U.S. 114 (1946).

Some judges have expressed reservations about applying the exhaustion rule to bar defenses in a criminal

prosecution,[1] and several courts have found particular circumstances justifying relaxation of the exhaustion rule.[2]

At the least, it can be said that many of the lower courts have not been altogether comfortable with invoking the exhaustion rule as a bar to a defense—frequently the only defense—in a criminal prosecution and, implicitly, giving judicial sanction to unlawful local board action. Given the opportunity to re-examine the entire exhaustion problem, the Court in *McKart* declined to treat the case before it simply as a "particular circumstances" case, but rather explored at length the analytical basis for the application of the exhaustion rule to draft prosecutions. Petitioner submits that the theory and purpose of the exhaustion rule justify the suspicion cast upon it by *McKart* in cases such as this.

A. *The Exhaustion Rule Evolved in the Context of Affirmative Litigation Where Its Effect Was to Delay Relief; It Is Misapplied in a Defensive Context, Particularly Criminal Prosecutions, Where Its Effect Is to Permanently Bar Relief.*

The classic statement of the exhaustion rule, "that no one is entitled to judicial relief for a supposed or threatened

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[1] "[T]o this court it appears unduly harsh to convict a young man following criminal prosecution for failure to submit to induction into the armed forces simply because he omitted to follow certain procedural rules prescribed in the selective service regulations. This is especially true when as in this case the registrant has satisfied this court of the sincerity of his convictions. However, the cases . . . require this court to conclude that it has no alternative but to enter a judgment of conviction in this case." *United States* v. *Warner*, 284 F. Supp. 366, 371 (D. Ariz. 1968).

See also, *United States* v. *Brown*, —— F.2d ——, 3 SSLR 3198, 3201 (3rd Cir., Aug. 7, 1970) (Adams, *J.*, concurring) *decision pending on rehearing in banc.*

[2] See, *e.g.*, *Wills* v. *United States*, 384 F.2d 943 (9th Cir. 1967); *United States* v. *Harris*, 302 F. Supp. 1194 (D. Ore. 1968); *Do-*

injury until the prescribed administrative remedy has been exhausted," *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), assumes two things, neither of which is consistent with its application to a draft prosecution: first, that a person is affirmatively seeking judicial review and, second, that there are still administrative remedies for him to exhaust.

> "The usual exhaustion case is one where review is sought prematurely. To deny review is simply to require the plaintiff further to pursue the administrative process or to await its conclusion." Jaffe, "Exhaustion of Administrative Remedies," 12 *Buff. L. Rev.* 327, 350 (1963).

But the defendant in a criminal prosecution is not seeking affirmative relief nor does he have any further administrative remedies to pursue. For him, the administrative process has already reached its conclusion. The Selective Service System has given him a final order. To deny review of his claim on exhaustion grounds is not to delay relief, it is to permanently foreclose it. As one court noted:

> "It cannot be denied that an administrative remedy was available to the defendant here for securing a reversal of the local determination and that such remedies were not exhausted. Assuming such failure bars the defendant from seeking affirmative relief, it is quite a different matter to say that he must necessarily exhaust those remedies in order to challenge the administrative order by way of defense to its

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nato v. *United States*, 302 F.2d 468 (9th Cir. 1962); *United States* v. *Seeley*, 301 F. Supp. 811 (D. R.I. 1969); *United States* v. *Carson*, 282 F. Supp. 261 (E.D. Ark. 1968).

enforcement." *United States* v. *Fritz Properties*, 89 F. Supp. 772, 778 (N.D. Cal. 1950).

See also, *Woods* v. *Laabs*, 92 F. Supp. 220 (W.D. Mich. 1950).

The fact is that the exhaustion doctrine, a judicially fashioned creature of affirmative litigation, was constructed by courts[3] to serve interests which can no longer be served by the time a prosecution has been brought. For example, exhaustion is frequently required in order to permit the litigant to vindicate his claim administratively or to permit the agency to correct its own errors, reasons cited by the majority below. See Point ID, *infra*. But applying the exhaustion doctrine at trial to bar a defense—after the administrative process has reached its conclusion—will serve neither of those interests.

Sometimes exhaustion is required in order to avoid interrupting the administrative process and to permit the agency to reach a final decision. Thus, courts have declined to review administrative action while it was still subject to further consideration by the agency. However, the fear of "litigious interruption," of disturbing the agency's consideration of the matter, see, *e.g.*, *Clark* v. *Gabriel*, 393 U.S. 256 (1968), has no relevance when the registrant's defense at a criminal trial is based upon the invalidity of his classification and requires the trial court to examine the local board's decision. The administrative role of the Selective Service System is then over and its final decision, in the form of an induction order, has been rendered. As Justice Murphy noted, concurring separately in *Estep* v. *United States*, 327 U.S. 114, 128-29 (1946):

[3] That the exhaustion doctrine in draft cases is a judge-made rule, not compelled by statute, is not in dispute and in fact was confirmed by both the majority opinion and the concurring opinion of Mr. Justice White in *McKart*, 395 U.S. at 197, n. 14 and 206.

"The selective process, in relation to the petitioners, was finally and completely interrupted at the time when they disobeyed the induction orders and subjected themselves to possible criminal liability. Any subsequent judicial review of the induction orders could have no possible effect upon the continuance of the selective process and could bear no earmarks of a 'litigious interruption.' Thus at the time of petitioners' trials the courts were confronted with accomplished interruptions rather than with a theory. A decision at that point to grant petitioners full hearings and to protect their constitutional rights would simply be a recognition of the fact that the Constitution protects the petitioners whenever their liberty is at stake, whatever may have been their motives in disobeying the orders."

This reasoning was adopted by Judge Zirpoli in *United States* v. *Gilmore*, 2 SSLR 3582 (N.D. Cal. 1969).

To summarize, courts have created the exhaustion doctrine in deference to the expertise of the administrative process and out of concern for not disrupting its operation. Since the "doctrine is concerned with the timing of judicial review of administrative action," 3 Davis, *Administrative Law* (1958) §20.01 at 57, it is logically invoked when its effect is merely to delay judicial review, not, as in a draft prosecution, to deny it completely.[4] In fact, en-

[4] One noted commentator has made the same observation regarding use of the exhaustion doctrine to bar review of military determinations:

"It appears, however, that phrasing the exhaustion doctrine in terms of complete denial of review is a misapplication of the doctrine. The exhaustion doctrine . . . does not bar jurisdiction but rather permits consideration of timing and comity by a

grafted onto the exhaustion doctrine are several exceptions to its application, at least two of which would apply to criminal trials and would warrant judicial review of challenged classifications despite the registrant's failure to exhaust.

The first exception to the requirement of exhaustion arises where the court's denial of review would cause irreparable injury. The definition of such injury by one commentator clearly establishes its relevance to the case at bar:

> "Irreparable injury in its strictest sense is the probable loss, if exhaustion is required, of the value . . . of an asserted right or defense." Jaffe, *Judicial Control of Administrative Action* 429 (1965).

In *Public Util. Commission* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943), the Court waived the requirement of exhaustion where the company was faced with immediate and irreparable injury (the expenditure of a large amount of money) if forced to pursue its administrative remedies. Justice Frankfurter, for the Court, cautioned against application of the exhaustion doctrine in "blind disregard of fact," *id.* at 469, observing that the orders in question were

> ". . . on their face invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act." *Ibid.*

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court in deciding whether to exercise its proper jurisdiction and review a case at a particular time. A court applying the exhaustion doctrine has jurisdiction but chooses to withhold consideration of the issues until the completion of a foreign decision-making process." Sherman, "Judicial Review of Military Determination," 55 *Va. L. Rev.* 483, 521 (1969).

If the loss of money can constitute irreparable injury so as to excuse a failure to exhaustion, *a fortiori* the possibility of conviction and imprisonment facing the defendant in a criminal prosecution justifies relaxation of the exhaustion requirement. When, as here, judicial inquiry need not go "beyond the orders themselves and the undisputed facts which underlie them . . . in order to discover that they are in conflict with the federal Act," application of the exhaustion doctrine is particularly inappropriate.

A second exception to the exhaustion doctrine occurs when an agency has exceeded the jurisdiction conferred on it by Congress or has infringed a right protected by Congress. *Wills* v. *United States,* 384 F.2d 943 (9th Cir. 1967).

In *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919), the Court permitted judicial review despite the failure to exhaust administrative remedies where it was claimed that the Interstate Commerce Commission had exceeded its statutory powers. That principle, applied to this case, would permit review of petitioner's claim that the local board denied his conscientious objector claim without a basis in fact since classification without a basis in fact, as this Court recognized in *Estep* v. *United States,* 327 U.S. 114, 122 (1946), exceeds the board's jurisdiction.

In *Leedom* v. *Kyne,* 358 U.S. 184 (1958), the Court reviewed an action brought to review a clearly illegal order of the National Labor Relations Board. Declining to require administrative appeal of the order, the Court said that it could not

> ". . . lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

Petitioner's right to conscientious objector status is guaranteed by statute. 50 U.S.C. App. §456(j). When, as the court below conceded, that status was denied him by the local board without a basis in fact, its action clearly overrode a right guaranteed by Congress and should have been reviewable without exhaustion of further appeals.

B. *Unless Mandated by Statute, Courts Have Traditionally Refused to Bar a Defense to Enforcement of an Allegedly Invalid Administrative Order by Invoking the Exhaustion Doctrine.*

What emerges from this review of the exhaustion doctrine is that courts have declined to apply it where to do so would work a substantial deprivation of rights. Its application to criminal prosecutions inevitably has that effect and, therefore, should be tolerated only when commanded by Congress. When Justice Murphy dissented from this Court's ruling which lifted the exhaustion doctrine out of its traditional administrative law setting and applied it to criminal prosecutions for violation of the draft law, he said:

> "No other barriers to judicial review of the induction order in a criminal proceeding are revealed by the structure of the Act. . . ." *Falbo* v. *United States,* 320 U.S. 549, 558 (1944).

Justice Murphy's search through the "structure of the Act" for authority to foreclose defenses by applying the exhaustion rule finds support in some circuit court decisions which a leading commentator says "embody the orthodox law." 3 Davis, *Administrative Law* §23.07 at 321 (1958). In those cases, the question, as here, was the application of traditional exhaustion concepts originating in

affirmative litigation to defensive situations involving the enforcement of a challenged order.

The government, in *Smith* v. *United States,* 199 F.2d 377 (1st Cir. 1952), sought to invoke the doctrine against landlords resisting an action to recover damages under the Housing and Rent Act of 1947, as amended, 63 Stat. 27, 50 U.S.C. App. §1896(b). The landlords had failed to seek review of the agency's initial determination. Judge Magruder, writing for the court, noted that the exhaustion doctrine

> "... had its origin in a discretionary rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an administrative remedy by which he might obtain the same relief." 199 F.2d at 381.

That situation he distinguished from defensive litigation where the doctrine's application would not merely delay relief by requiring a litigant to pursue an alternative remedy but would deny relief permanently by depriving him of the opportunity to challenge the order against which he defended. Conceding that some cases had upheld the exhaustion rule in enforcement proceedings and precluded challenges to the validity of the regulation or order, Judge Magruder observed that these results were demanded

> "... *by prescription of the statute,* rather than by application of the accepted rule in courts of equity that equitable relief would be denied to a petitioner who had failed to exhaust available administrative remedies." *Ibid.* (Emphasis added.)

The Court then carefully scrutinized the act and found no authority for denying the landlord the right to challenge the order despite the fact that he had failed to pursue a previously available administrative procedure.

Subsequently, in *United States* v. *McCrillis,* 200 F.2d 884 (1st Cir. 1952), Judge Magruder again analyzed the exhaustion doctrine and reaffirmed the conclusion in *Smith* that the doctrine

> "... is wholly misapplied when invoked against a landlord who is not seeking equitable relief but is merely defending himself against an enforcement action." *Id.* at 885.

Judge Magruder stated that cases where the doctrine had been applied to enforcement proceedings were not to the point because

> "... there the Congress itself had withdrawn from the district courts jurisdiction or power to consider the validity of price or rent regulations or orders, and, as that Act originally provided, the only way to raise the issue of validity was by filing a statutory protest with the Price Administrator, followed by a complaint in the Emergency Court of Appeals upon administrative denial of the protest." *Ibid.*

Judge Magruder again searched the Housing and Rent Act in vain for some requirement that administrative remedies be exhausted.

> "In the absence of any statutory provision on the subject, we stated in Smith v. United States, supra [199 F.2d 382], that we were not aware 'of any general

judge-made doctrine that a defendant in an enforcement suit, charged with having violated an administrative regulation or order, is precluded from setting up the defense that the regulation or order is invalid, merely because the defendant had failed to make use of an available administrative procedure by which he might have obtained administrative action to set aside the regulation or order.' We know of no controlling precedent in the Supreme Court establishing any such proposition." *Id.* at 886.

He then distinguished two of the major decisions upon which application of the exhaustion doctrine in draft cases is frequently predicated, *Yakus* v. *United States,* 321 U.S. 414 (1944), and *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938), by noting that exhaustion was explicitly mandated by Congress in those two situations.

The position petitioner urges was stated succinctly in *FPC* v. *Arizona Edison Co.,* 194 F.2d 679, 686 (9th Cir. 1952), "In the absence of an express statutory command we find no authority requiring a court of equity to enforce an administrative order invalid on its face."

C. *Exhaustion of Administrative Remedies as a Condition of Defending a Criminal Prosecution Is Not Required by the Military Selective Service Act of 1967.*

This Court has consistently taken the position that fundamental rights cannot be limited by rules of administrative agencies absent an explicit mandate from Congress. See, *e.g., Greene* v. *McElroy,* 360 U.S. 474 (1959); *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Ex parte Endo,* 323 U.S. 283 (1944). Similarly, courts should not allow judge-made rules, such as the exhaustion rule, to abridge rights of draft regis-

trants without explicit Congressional authority. The court below conceded petitioner's entitlement to an exemption provided by Congress, but applied the exhaustion rule to bar judicial review.

Neither the Selective Training and Service Act of 1940, 54 Stat. 885; 50 U.S.C. App. §§301-318, nor its amended versions of 1948, Act June 24, 1948, c. 625, Title I, §1, 62 Stat. 604, and 1951, Act June 19, 1951, c. 144, Title I, §1(a), 65 Stat. 75, made any mention of an exhaustion requirement. Although those acts contemplated the existence of local boards and a system for appealing classifications, there was no suggestion that judicial review of the order of a local board was conditioned on pursuing administrative appeals.

When Congress reconsidered the draft laws in 1967, one of its concerns was judicial review of local board actions. Committees of both Houses took up the issue. Although both Committees endorsed a provision restricting judicial review prior to induction, they did not make any recommendation that would require exhaustion of appeals as a condition of judicial review of a post-induction challenge to local board actions.[5] In fact, the report of the Senate Armed Services Committee stated specifically and without qualification:

> "If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the legality of the classification."[6]

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(b)(3) (hereinafter referred

[5] H.R. Rep. No. 267, 90th Cong., 1st Sess., 30-31 (1967); S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967).

[6] S. Rep. No. 209, *supra*, at 10.

to as the "Act"), which incorporated the Committees' suggestions is concerned solely with the question of pre-induction review. The power to review a classification *following* refusal of induction is not statutorily qualified.[7] Since Congress had the question of judicial review specifically before it in 1967, one can only infer that it did not wish to qualify the right granted under the statute by procedural formalities.[8] When Congress said that conscientious objectors "shall be exempt," 50 U.S.C. App. §456(j), it did not authorize the courts to limit that category to those who pursued their administrative appeals.[9]

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[7] Both Justices writing in *McKart* presumed that Congress had not mandated exhaustion. See note 3, *supra*.

[8] When Congress has wished to condition judicial review on exhaustion of administrative remedies, it has done so quite explicitly. The Agricultural Adjustment Act, 7 U.S.C. §1367, deprived federal courts of jurisdiction to consider the validity of any determination made under the act except where administrative review had been sought. In *Miller* v. *United States*, 242 F.2d 392 (6th Cir. 1957), defense to an enforcement proceeding brought under the act was rejected on exhaustion grounds.

[9] We do not argue here that a registrant who fails to even present his conscientious objector claim to a local board has a right to have that claim evaluated in court. Petitioner presented his claim to the local board. The requirement that a claim be *initially* presented to the agency, sometimes called "primary jurisdiction" or "preliminary jurisdiction," does not imply a requirement of exhaustion. The distinction was discussed in *United States* v. *Fritz Properties*, 89 F. Supp. 772, 777 (N.D. Cal. 1950):

> "The 'exhaustion' doctrine is a product of judicial self-limitation resembling the requirement of equity jurisdiction—that a litigant has no standing in equity where he has an adequate remedy at law—although matters of comity and need for orderly administrative procedure helped shape the doctrine. The 'preliminary jurisdiction' rule, on the other hand, presupposes a complete absence of judicial power to deal with the matter because of a legislative grant of exclusive primary jurisdiction to an administrative body."

See also, 3 Davis, Administrative Law §1901 (1958). A failure to observe that distinction led the Third Circuit to improperly apply

D. *The Decision Below Unduly Restricted the Meaning of* McKart.

The limitations discussed above on the applicability of the exhaustion doctrine to draft prosecutions were recognized in *McKart* and led this Court to warn generally that the

> "... use of the exhaustion doctrine in criminal cases can be exceedingly harsh ... [and] should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review." 395 U.S. at 197.

The Court analyzed the exhaustion doctrine and noted those factors which generally weighed in favor of the exhaustion doctrine. The majority below reviewed those same factors and, finding three of them applicable to the instant case, applied the exhaustion doctrine. *McKart*, however, did not say that the presence of those factors *mandates* application of the exhaustion rule. Nor could it have, for in fact all three factors were present in *McKart*.

The first of those factors, that petitioner might have been "successful in vindicating his rights in the administrative process," (A. 73), was obviously present in *McKart*. Petitioner there, just as petitioner here, could have appealed the denial of his claimed exemption and been granted it. Similarly, the second factor, which resembles the first, namely "that the agency be given a chance to discover and correct its own errors," (A. 73), was present in *McKart*.[10]

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the exhaustion doctrine because "Congress has designated an administrative agency as the initial forum for the adjudication of contested rights ...' *United States* v. *Zmuda*, 423 F.2d 757 (3rd Cir. 1970).

[10] The Second Circuit's substantial reliance on the possibility of the local board's action being reversed by the appeal board might

McKart did not finally rely on those factors because they simply were not germane to the case before the Court. That is, however appropriate it may have been to instruct registrants to exhaust their administrative remedies because they might be "successful" or because Selective Service might have corrected "its own errors," such advice did not help evaluate McKart's own case. At the time McKart came to this Court, the administrative process was over. The opportunity for McKart to pursue his administrative remedies there was no longer open. If those factors were to be relied on, McKart had to lose—and not just temporarily, as in the typical administrative exhaustion case where judicial review is merely postponed, but rather he had to lose permanently. There being no further administrative remedies to exhaust, his conviction would stand.

Implicit in the Court's decision in *McKart* is the recognition that the two factors described above might well be appropriate for consideration where there were still administrative remedies to which a petitioner could be remitted, but that they were of little relevance in a criminal case where the administrative process was at an

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be considered in light of the Marshall Commission's disclosure that, in fiscal 1966 (the last year for which statistics are available) the New York City Appeal Board, which had jurisdiction over petitioner's board, reversed local board classifications in only 7% of the appeals it heard, one of the lowest percentages in the country. Report of the National Advisory Commission on Selective Service, "In Pursuit of Equity: Who Serves When Not All Serve?" 110 (1967). There is no way of knowing how much consideration petitioner's appeal board would have given his case, but another appeal board was found to allot less than one minute to each case before it and to decide those cases on the basis of summaries of registrants' files prepared by the local board clerk rather than upon review of the file itself. *United States* v. *Wallen*, —— F. Supp. ——, 3 SSLR 3125 (D. Minn. 1970). Petitioner does not argue that, on that basis, an appeal would have been futile. But the interest "underlying the exhaustion rule" might be somewhat diminished given the remote likelihood of success on appeal.

end. A more relevant concern in that situation, the third factor analyzed by the court below, was what would happen if the failure to exhaust were excused. In other words, if, as a general rule, exhaustion is preferred—for reasons which relate in part to the two factors we have been discussing—will a decision excusing exhaustion encourage other registrants to avoid their administrative remedies? In answering this question, the Court came to the fundamental difference between a consideration of the exhaustion requirement in its traditional setting—an affirmative request for relief in advance of completing the administrative process—and in the context of a criminal defense. Whereas in the former situation a general relaxation of the exhaustion requirement might well encourage others to seek immediate judicial relief and by-pass the administrative agency, this Court found no such danger in McKart's situation:

> "We doubt whether many registrants will be foolhardy enough to deny the Selective Service System the opportunity to correct its own errors by taking their chance with a criminal prosecution and a possibility of five years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies before deciding whether or not to continue the challenge to their classification. . . . In short, we simply do not think that the exhaustion doctrine contributes to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction." 395 U.S. at 200.

The simple fact which was apparent in *McKart,* and which, we believe, must control here is that relaxation of

the exhaustion rule in criminal prosecutions will be of no concern to the average registrant involved with the Selective Service System. To the registrant who seeks to be deferred or exempt from military service, the fact that he can challenge his classification at trial if indicted for refusal to submit to induction is irrelevant.[11] He would still have to persuade a court that the local board had no "basis in fact" for denying his claim, whereas he would only have to convince the Selective Service System that, on the weight of all the evidence, he deserves the classification.[12] One court, in declining to require exhaustion, stated:

> "Exercising judicial review in this case will not significantly encourage circumventing the administrative process by resort to the courts. As *McKart* itself notes, the opportunity to appeal is one that few registrants will knowingly forego, because of the risk incident to determining the issue of classification in court under the strict basis in fact test, with the possibility of criminal conviction." *United States* v. *Davila*, 429 F.2d 481, 485 (5th Cir. 1970).

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[11] Twenty years ago, a district court, distinguishing between affirmative and defensive actions, responded similarly to the government's prophecies regarding the relaxation of the exhaustion requirement in a rent enforcement proceeding:

> "It should also be noted that the fear of wholesale violations of such administrative orders are probably unfounded, since a party wishing to challenge the administrative jurisdiction in such a manner, runs the risk of liability for treble damages if the administrative contention be upheld by the court, a sufficient deterrent in a close case." *United States* v. *Fritz Properties*, 89 F. Supp. 772, 780 (N.D. Cal. 1950).

[12] Other inducements for a registrant to appeal a local board's denial of his claim are discussed in *Lockhart* v. *United States*, 420 F.2d 1143, 1155 (9th Cir. 1969) (dissenting opinion).

Thus, if a registrant wants a classification other than I-A, he will, regardless of what the Court does in this case, present his claim to the local board and to the appeal board and to anyone else who will hear it.[13] What relaxation of the exhaustion requirement *will* establish, however, is that registrants will not "go to jail without having any judicial review of an assertedly invalid order." 395 U.S. at 197. Petitioner submits that to foreclose that review on the basis of the exhaustion doctrine is not consistent with the traditional understanding of that doctrine or with the intent of Congress.

The position we urge has been adopted by the Fifth Circuit, *United States* v. *Davila,* 429 F.2d 481 (5th Cir. 1970) in a case similar to the instant case. The defendant's application for conscientious objector status was denied by his local board and he failed to appeal. At trial he offered no explanation for his failure, and his claim that the denial of his conscientious objector application was without a basis in fact was rejected by the district court on exhaustion grounds. Relying on *McKart,* the Fifth Circuit decided that the exhaustion doctrine did not bar review. The court's reasoning is singularly applicable to the case at bar:

> "Disposition of Davila's claim, like McKart's, required the application of a legal standard to an undisputed set of facts. Where the file reveals no facts refuting a registrant's claim of conscientious objection, the only question remaining is the legal issue of whether or

[13] If this speculation proved to be wrong and relaxation of the exhaustion doctrine was found to subvert the Congressional purpose, such a finding, under the analysis discussed above, should properly be made by Congress.

not the registrant has made out a prima facie case for exemption." 429 F.2d at 484.

Addressing itself specifically to this Court's dictum in *McKart* that Selective Service *may* have a "stronger interest" in requiring appeal of conscientious objector claims since they "would appear to be examples of questions requiring the application of expertise or the exercise of discretion," 395 U.S. at 198, the Fifth Circuit said:

> "The appeal board can bring no special expertise to bear on this question, and the Selective Service System's discretion is explicitly limited by the legal standard that a given minimal showing requires exemption. *Witmer* v. *United States*, 348 U.S. 375, 99 L. Ed. 428 (1955)." 429 F.2d 481 at 484.

Both the government (Brief in Opposition to Petition for Certiorari, p. 7) and the court below (A. 73), as well as the majority in *Lockhart* v. *United States*, 420 F.2d 1143 (1969), rely strongly on the *McKart* dictum to argue that conscientious objector claims require exhaustion because they demand the exercise of discretion. But it is well to remember that the courts, unlike the Selective Service System, have never undertaken "an appraisal of the registrant's subjective state of mind . . . ," *id.* at 1145, in reviewing such claims. Courts, under the "basis in fact" test, may not hear evidence nor weigh facts nor review the local board's exercise of discretion. Rather, as *Davila* makes clear, the task of the court is simply to apply a legal standard to undisputed facts and determine whether, as in *McKart*, the local board committed legal error by exceeding its statutory jurisdiction.

That task, of course, is the same one which courts in draft cases have traditionally performed where registrants have taken appeals. Where a local board classifies without a basis in fact, the judicial interest in reversing such action is as great whether or not an appeal has been taken.

The Fourth Circuit, following *McKart,* has also declined to require exhaustion of a conscientious objector claim where the local board committed an error of law by applying an erroneous legal standard to the claim. *United States* v. *Eades,* 430 F.2d 1300 (4th Cir. 1970). Although the error there concerned statutory construction, the court could have required exhaustion on the basis of the two factors relied on by the court below, that the registrant might have been successful in "vindicating his rights" and that Selective Service should have been "given a chance to discover and correct its own errors." Nevertheless, the court stated that the registrant made a prima facie case for conscientious objector status and that his failure to exhaust administrative remedies was no bar to raising his defense of invalid classification. In effect, the court said that the district court should have determined whether a basis in fact existed for the registrant's classification, whether or not the registrant had appealed his classification through the administrative process.

The Fourth Circuit, in interpreting this Court's remand in *McNeil* v. *United States,* 395 U.S. 463 (1969), has made it clear that it does not mean to limit its position on exhaustion to cases where a local board has committed procedural errors. Although the court, *United States* v. *Davis,* 413 F.2d 148, 151 (4th Cir. 1969), found "special circumstances" justifying the failure to exhaust, it used this broad language regarding the general problem:

"We think *McKart* undermines the rule in this and other circuits that in conscientious objector and ministerial status cases the district court ordinarily need not examine the selective service file to determine whether or not there exists a basis in fact for the I-A classification unless the registrant has appealed to the Administrative Appeal Board."

We believe that interpretation to be consistent with *McKart* as well as with fundamental principles of fairness. The court below was seemingly more concerned with the imposition upon the resources of the judicial machinery which may have been occasioned by petitioner's failure to exhaust than with upholding a term of imprisonment for violation of an unlawful induction order (A. 76). That is a hierarchy of values which not only runs contrary to the intent of the Act but is hostile to a system of justice which has traditionally erected procedural rules to protect the accused, not to defeat him. The remarks of Judge Zirpoli are particularly apt:

"This court is unable to conclude, and the government has not pretended, that a fair and just system of selection will improperly order a man into military service, punish his refusal to submit, but foreclose his valid objections to the induction order on the ground that the defendant had been recalcitrant in observing required but unrelated procedures. Our elaborate network of constitutional safeguards for criminal defendants, for example, has been erected on the premise that guaranteed protections for the accused are not to be suspended simply because their intended beneficiary has himself broken the law. No court could sanction

violations of *Miranda* simply because the defendant had resisted arrest. The government's tu quoque argument, although not without its proper analogue in civil cases, is inappropriate to a criminal case, in which the undiminished burden must be on the prosecution. A Selective Service prosecution is a particularly noxious arena for the government's position, since it grows out of an administrative tangle frequently inhospitable to registrants and sometimes used to punish as well as to select." *United States* v. *Gilmore*, 2 SSLR 3582, 3583 (N.D. Cal. 1969) (footnotes omitted).

E. *Given the Failure of the Local Board to Ever Consider the Merits of Petitioner's Conscientious Objector Claim, an Appeal of His I-A Classification Would Have Been Futile.*

Analyzing this as a "particular circumstances" case, see cases cited at n. 2, *supra*, exhaustion should not be required because the local board committed a fundamental procedural error. As Judge Feinberg demonstrated (A. 79-82), the record is clear that petitioner's local board failed to ever consider his application for conscientious objector status on its merits. That failure is not only a violation of the regulations, 32 C.F.R. 1622.1(c), but a direct violation of the Act, which requires that a local board "shall . . . hear and determine . . . all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title . . ." 50 U.S.C. App. §460(b)(3). By failing to consider petitioner's application, the board avoided its most fundamental responsibility under the Act, to gather information so as to properly classify the registrant. What the majority calls "an inadvertent failure" (A. 75), was in fact so "basically lawless" that a court may intervene without requiring appeal through the ad-

ministrative system. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233, 237-38 (1968). See also, *Hunt* v. *Local Board No. 197*, 423 F.2d 576 (3rd Cir. 1970); *Barker* v. *Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969). See generally, Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 *Geo. L.J.* 315, 322-31 (1967); *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967).

The majority below avoided this issue by suggesting that the board first considered petitioner's application when it was filed in February 1966. Judge Feinberg correctly points out (A. 79), however, that, since petitioner was then entitled to a II-S deferment, it would have been inappropriate to consider his conscientious objector claim at that time. 32 C.F.R. 1623.2. The Second Circuit so held in *United States* v. *Bornemann*, 424 F.2d 1343 (2d Cir. 1970). The only reasonable reading of the local board chairman's testimony at trial is that the board followed the normal procedure and deferred consideration of McGee's application until he was no longer entitled to a lower classification (A. 80-81). This interpretation of the board's action is supported by the requirement that a consideration of the merits of petitioner's claim would have required a re-opening and the issuance of a new classification card (SSS Form 110). *Mulloy* v. *United States*, 398 U.S. 410 (1970); *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967). The board did not send petitioner a new classification card because it did not consider his claim on the merits.

Nevertheless, when petitioner no longer qualified for a II-S classification and his conscientious objector claim

again came before the board, the board did no more than reaffirm its earlier decision (A. 82). Thus, on neither occasion did the board reach the merits of petitioner's conscientious objector application. As Judge Feinberg notes, an appeal by petitioner of his I-A classification would not have revealed that procedural deficiency since petitioner could not have known about it nor would his file have disclosed it (A. 84). Under these circumstances, the interest in requiring exhaustion is particularly insubstantial. The Ninth Circuit Court of Appeals recently agreed with this position:

> "A major premise supporting the requirement of exhaustion is that recourse to the full administrative process might satisfactorily have resolved the debated issues. Accordingly, it is unlikely that a court would require exhaustion if an administrative body's actions constitute a readily discernible error of a type unlikely to be corrected by further recourse to the administrative process and resulting in great injury to a party or to the public." *Craycroft* v. *Ferrall,* 408 F.2d 587, 594 (9th Cir. 1969).

In *United States* v. *Burns,* 296 F. Supp. 162 (D. Colo. 1969), the court considered the kind of situation presented here and waived the exhaustion requirement:

> ". . . we note also that an appeal would have been inconsequential in this instance because there would not have been any information in the file for the appeal Board to act on since the Board itself took no action." *Id.* at 165.

In the final analysis, the majority below permitted petitioner's conviction to stand despite his conceded entitlement to a statutory exemption because he was "stiff-necked," because the beliefs that had made him a conscientious objector had brought him to a moral position of noncooperation with Selective Service. That position it should be clear, hardly contravenes the unqualified Congressional intent to exempt from military service those who are "conscientiously opposed to participation in war in any form." 50 U.S.C. App. §456(j). Petitioner was entitled to and should have been granted that exemption. This Court should reverse the conviction and direct the entry of a judgment of acquittal on Count One.

II.

As a full-time student at Union Theological Seminary studying for the priesthood under the direction of the Roman Catholic Church, petitioner was entitled to a IV-D classification despite his failure to request the classification from his local Board.

Section 6(g) of the Act, 50 U.S.C. App. §456(g), exempts full-time students in recognized divinity schools who are preparing for the ministry under the direction of recognized churches from training and service under the Act. See also, 32 C.F.R. 1622.43.

There was no disagreement at trial about petitioner's status as a full-time divinity student at Union Theological Seminary, a recognized divinity school, and the trial judge so found (A. 42). Nor was there disagreement that petitioner satisfied the other statutory requirement that registrants be "preparing for the ministry under the direction of recognized churches. . . ." Petitioner testified that he was studying for the priesthood (A. 39), and his parish priest testified that he had recommended the petitioner for ad-

mission to Union (A. 64). Though not rejecting this testimony, Judge Murphy, in somewhat ambiguous language, found that Union was a non-denominational seminary and not under the direction of a recognized church (A. 42). The majority below conceded that, if Judge Murphy meant that a student at Union could not receive a IV-D classification because Union is not under the direction of a recognized church, he would be misinterpreting the statute, which requires students, not schools, to be under the direction of recognized churches (A. 70).

Petitioner's entitlement to a IV-D classification is, therefore, indisputable. That petitioner did not request the classification is of no consequence. Unlike the language in Section 456(h)(1) of the Act and 32 C.F.R. 1622.25, providing for student deferments, which requires the registrant to request the classification, the language of the ministerial exemption is mandatory; one who qualifies "*shall* be exempt from training and service." Section 456(g) (emphasis added). See *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968). See also, *United States* v. *Wachtel,* 311 F. Supp. 804 (N.D. Cal. 1969); *Turley* v. *Selective Service System Local Board No. 134,* 301 F. Supp. 845 (C.D. Cal., 1969). This view of the exemption was adopted by the court in *Kimball* v. *Selective Service System Local Board No. 15,* 293 F. Supp. 266, 267 (S.D.N.Y. 1968), which assumed that the exemption had to be granted even though not requested.

> "Although [plaintiff] Jack is now a full-time divinity student, he has not sought to be reclassified IV-D. . . . Because Jack was not present at the hearing of this motion and because defendants did not produce his file, it is not clear whether, before this motion, his draft board was aware of his entitlement to a clear statutory exemption from military service. 50 U.S.C. App.

§ 456(g). . . . Petitioner here has, before induction, made known his entitlement to exemption. . . . This exemption is mandatory, not permissive. See 50 U.S.C. App. § 456(g); 32 C.F.R. 1622.43(a)."

As in *Kimball*, petitioner, although not requesting an exemption, made known to the government that he qualified for it. In fact, it was the uncontradicted testimony at trial that petitioner advised the government on at least four separate occasions of his attendance or prospective attendance at divinity school: (1) in the Classification Questionnaire (SSS Form 100) completed soon after registering for the draft; (2) in his letter to President Johnson, which was later forwarded to his local board; (3) when interrogated by FBI agents; and (4) in testimony before the grand jury and the same Assistant United States Attorney who later conducted the prosecution of petitioner.

The import of these events is apparent. From the time of petitioner's first Classification Questionnaire in 1961, up to and including the time the local board classified him I-A in September 1967, ordered him to report for a physical in October and ordered him to report for induction in January 1968, it had substantial information to suggest that petitioner was entitled to a IV-D classification.

The majority below claimed, however, that petitioner did not submit sufficient proof of his entitlement to the IV-D classification, that there was a "basis in fact" for denying petitioner the exemption in that he failed to provide evidence that he was studying "under the direction of" his church (A. 69).[14] But the procedure directed by

[14] Since the dissent below did not even discuss this issue, the government is correct, albeit somewhat disingenuous, in observing in its Brief in Opposition (p. 10, n. 6) that the dissent "did not disagree with the majority on this issue."

Selective Service National Headquarters in Local Board Memorandum No. 56 places this burden on the Local Board. In order to substantiate claims for ministerial exemptions, a local board "must require" the registrant to furnish evidence that:

> "(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and
>
> (2) He is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school . . ."

Furthermore, the Memorandum suggests that more "detailed information" may be solicited from the school. In addition:

> "If the local board considers the information it has received to be insufficient for the purpose of making a determination, it should request assistance or additional information from the State Director of Selective Service."

Thus, it was the obligation of the board, upon receiving information that petitioner may have been entitled to a IV-D classification, to solicit the additional information described in the Memorandum.[15] This obligation of a local board is analogous to its duty to send a registrant an application for conscientious objector status (SSS Form

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[15] It might be argued that the duty imposed on the board by Local Board Memorandum No. 56 was met by merely sending the Current Information Questionnaire (SSS Form 127) which petitioner declined to return. However, that form solicits no more information about attendance at divinity school than the board already had in its possession (Govt. Ex. 30, A. 52-53, especially "Series V.—Education"). In other words, that form would not have given the information required by Local Board Memorandum No. 56. In any case, petitioner's board, in compliance with the Memorandum, could have solicited the information directly from the school.

150) when the registrant informs the board that he is claiming conscientious objector status. The registrant need not formally request the Form 150. *United States* v. *Turner*, 421 F.2d 1251 (3rd Cir. 1970). The failure to give a registrant a requested Form 150 prior to the scheduled date of induction has been held to vitiate a failure to report for induction. *Boswell* v. *United States*, 390 F.2d 181 (9th Cir. 1968); *United States* v. *Stafford*, 389 F.2d 215 (2d Cir. 1968).

As for Assistant United States Attorney Robinson, he acquired personal knowledge in the grand jury room of petitioner's entitlement to a IV-D classification weeks before an induction order was mailed (A. 39). Nevertheless, he secured indictments some three months later with full knowledge that the board actions on which they depended were wholly unlawful.[16] Had petitioner been properly classified and thus exempt from service, it is unlikely that any of the counts of petitioner's indictment would have been brought.[17]

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[16] This would seem to do clear violence to the letter and spirit of the representation made to the Supreme Court by the Solicitor General in *Oestereich, supra.* In his Brief for the Respondents, arguing that review of the punitive reclassification of a divinity student could be had in a prosecution for induction refusal, the Solicitor General said:

> "... in view of the explicit exemption granted by Section 6(g), the Attorney General would not have started such a prosecution ..." (p. 64)

The Solicitor General goes on to say that if, as in this case, the Attorney General did proceed with a prosecution, "it would have been the clear duty of the court to have dismissed the prosecution on a showing that petitioner comes within the exempted class." (*Ibid.*)

[17] In an official publication of the Selective Service System, *Legal Aspects of Selective Service* (1969), the following statement appears:

> "Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem

The information given to Robinson was effective notice of petitioner's eligibility for a IV-D even though not given directly to the board. It is not necessary, as the Second Circuit has recognized, that a claim for exemption be made directly to the board. *United States* v. *Holmes*, 426 F.2d 915 (2d Cir. 1970); *United States* v. *Stafford*, 389 F.2d 215 (2d Cir. 1968). This is in accordance with the position taken by Chief Judge Solomon in *United States* v. *Hanna Nickel Smelting Company*, 253 F. Supp. 784, 793 (D. Ore.), *aff'd* 400 F.2d 944 (9th Cir. 1968):

> "The Government, like a private corporation, acquires knowledge through its agents. Under well-established principles of agency, a principal is bound by the knowledge of its agents concerning a matter upon which it is the agent's duty to give the principal information. Restatement Agency 2d §272. It is no defense that the agent did not, in fact, communicate his knowledge to the principal."

In short, the Government "knew the facts" relevant to petitioner's eligibility for a IV-D classification. *United States* v. *Georgia-Pacific Company*, 421 F.2d 92, 97 n. 9 (9th Cir. 1970).

We need not consider the outer limits of this agency principle in all draft cases. Suffice it to say that in this case

---

that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work. . . . By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12(a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards" (p. 47).

the information was not conveyed to some remote employee of the government in the Food and Drug Administration. Rather it was given to a Justice Department lawyer, intimately familiar not only with Selective Service law but with the young man against whom he ultimately sought indictments. There can be no denying that the government, before initiating these proceedings, knew that petitioner was in divinity school preparing for the ministry. That being the case, the statute's command is unequivocal: he *"shall"* be exempt.

The court below rejected this argument partly on exhaustion grounds. For reasons advanced in Point I, *supra,* we believe that doctrine inapplicable to petitioner's IV-D claim. Moreover, the judicial convenience which the rule typically serves—to spare courts the burden of hearing evidence more properly presented to the Selective Service System—can no longer be served here. The trial judge took substantial evidence regarding petitioner's entitlement to a ministerial exemption, without objection by the government (A. 20-22, 25). Inasmuch as the trial court, in its discretion, decided to consider the propriety of petitioner's classification, there was no "governmental interest compelling enough," *McKart* v. *United States,* 395 U.S. 185, 197 (1969), to justify the Second Circuit invoking the exhaustion rule.

In view of the mandatory language of the Act regarding divinity student exemptions, petitioner's I-A classification and order to report for induction were invalid, and the Court should reverse the conviction and enter a judgment of acquittal on Count One.

III.

The conviction for failure to report for a physical examination cannot stand because it was a direct result of petitioner's unlawful classification.

A. *Had Petitioner Been Classified I-O His Failure to Report for the Physical Examination Would Not Have Been Criminal.*

If the board had granted petitioner's application for conscientious objector status, he should have been placed in Class I-O, see Point I, *supra*. He then could have been lawfully called for a physical examination but his failure to report would not have been criminal. Local Board Memorandum No. 14 states Selective Service policy with regard to I-O registrants who fail to report for examination:

> "3. Action by Local Board Subsequent to Refusal of Its Own Registrants to Submit to Armed Forces Examination....
>
> (b) If the registrant is in Class I-O, consider him for all purposes as if he had been physically and mentally examined and found acceptable for military service and process him thereafter in the same manner as any other registrant in Class I-O who has been found acceptable for service after being given an armed forces physical examination.... "

This policy is implemented in the Order to Report Form (SSS Form 223, Govt. Ex. 33, A. 53-54) itself:

> "To Class I-O Registrants:
>
> This examination is given for the purpose of determining whether you are qualified for military

service. . . . If you fail to report for or submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service."

The import of these policy statements is unmistakable: a registrant in Class I-O who fails to report for a physical examination has not refused "to perform any duty required of him" within the meaning of the Act. 50 App. U.S.C. §462(a). As a result, one court has said:

> "It is not disputed, and this court finds, that both classes of conscientious objectors—not only those who claim I-A-O status but also those who claim I-O status—are required under Selective Service procedures to be ordered by local draft boards to submit to physical examinations. 32 C.F.R. §1628.10. However, those conscientious objectors who are classified I-O and who nevertheless fail to report as ordered for a physical examination are not declared delinquent but, rather, are deemed to have met the requirement." *United States* v. *Walsh,* 279 F. Supp. 115, 118-19 (D. Mass. 1968).

To the same effect are the decisions in *Shoemaker* v. *United States,* 413 F.2d 274 (9th Cir. 1969), and *United States* v. *Mendoza,* 295 F. Supp. 673 (E.D.N.Y. 1969). Judge Feinberg, dissenting, agreed with petitioner's position on this point (A. 86-88), while the majority below affirmed petitioner's conviction on Count Two without even considering the validity of this argument (A. 78).

B. *Had Petitioner Been Classified IV-D, He Could Not Have Lawfully Been Ordered to Report for a Physical Examination.*

The registrants who may be ordered to report for a physical examination are strictly limited by the Selective Service regulations. 32 C.F.R. 1628.11 provides that:

> "(b) . . . the local board shall mail an Order to Report for Armed Forces Physical Examination (SSS Form 223) to registrants who have been classified in Class I-A, Class I-A-O, and Class I-O. . . .
>
> (c) The local board may also mail an Order . . . to any registrant who is classified in a class other than Class I-A, Class I-A-O, or Class I-O if it determines that his induction may occur shortly. . . ."

At the time petitioner was ordered to report for a physical examination on October 4, 1967, his board had information in its possession which should have compelled them to classify him IV-D. See Point II, *supra*. Had petitioner been so classified, he would not have been in a class which could lawfully have been ordered to report for a physical examination, §1628.11(b), nor would the board have had any basis to determine that his induction would occur shortly, §1628.11(c).

The board's unlawful failure to classify petitioner either I-O or IV-D thus excuses petitioner's failure to report for the physical examination, and the Court should reverse the conviction and enter a judgment of acquittal on Count Two.

IV.

Since petitioner was improperly classified I-A, he was not guilty of failing to possess a *valid* notice of classification.

When petitioner was classified I-A on September 19, 1967, he was mailed a Notice of Classification (SSS Form 110). In accordance with his determination to cease cooperating with Selective Service, he returned the unopened envelope to the board.

Petitioner was subsequently indicted for allegedly violating 32 C.F.R. 1623.5 which requires every registrant to "have in his personal possession at all times . . . a *valid* Notice of Classification (SSS Form 110) issued to him showing his current classification. . . ." (Emphasis added.)

But the September classification, for the reasons set forth in Points I and II, *supra,* was not lawful; petitioner should have been classified either IV-D or I-O. Notwithstanding the opinion of the majority below that it was unnecessary to consider this argument (A. 78), petitioner submits that the I-A Notice of Classification was not a valid one and his failure to possess it was not criminal.

Were it otherwise, it would defeat the functions of the possession requirement discussed in *United States* v. *O'Brien,* 391 U.S. 367 (1968). There this Court upheld the law prohibiting the burning of draft cards on the basis that they aided the smooth functioning of the Selective Service System. With regard to the classification certificate, the Court stated that it permitted the registrant to easily ". . . dispel a question as to whether he might be delinquent in his Selective Service obligations." *Id.* at 378.

Moreover, it provided the registrant with ". . . a rapid and uncomplicated means for determining his fitness for immediate induction . . . ," *id.* at 379, and assisted local boards other than the registrant's own in determining his proper classification. *Ibid.* Since none of these functions could be served by a card possessing an incorrect classification, it is clear that petitioner's failure to possess such a card cannot be considered a violation of 32 C.F.R. 1623.5.

One court has explicitly adopted this position. In *United States* v. *Hertlein,* 143 F. Supp. 742 (E.D. Wis. 1956), a case involving a registrant found to have been improperly reclassified from I-A-O to I-A, the court stated:

> "The defendant returned his Notice of Classification, issued July 14, 1953, to his local board. That card was the last classification of the defendant issued by the board and showed that the defendant had been classified I-A. As we previously stated in discussing Count II, the board was without jurisdiction to reclassify the defendant at that time. The I-A classification was invalid. As a result, the defendant had no duty to carry the classification card." *Id.* at 146.

Here the petitioner was not charged with returning his last valid classification card, his II-S card. He was convicted only for failing to possess the I-A card. That classification being invalid, the Court should reverse the conviction and enter a judgment of acquittal on Count Three.

V.

The conviction on Count Four cannot stand because petitioner substantially complied with the requirement that he submit the information requested by his board.

Count Four charged the petitioner with failing to submit the information requested in a Current Information Questionnaire (SSS Form 127) mailed to him in July 1967. It is important to note two things about this count of the indictment. First, it does *not* charge a failure to return the questionnaire, but rather a failure to give information. Second, it ascribes the failure to submit the information to the entire period from July 3, 1967 to the date of the filing of the indictment, namely, January 29, 1969.

A. *The Trial Judge Erroneously Charged the Jury on Count Four.*

It is apparent, therefore, that the petitioner could not be convicted on this count unless he knowingly failed to provide the information during that period, including the day he refused induction. Nevertheless, Judge Murphy charged:

> "In order to find the defendant knowingly violated the duty to submit a current information questionnaire to his local board, you must find that he was aware of this duty and that he deliberately refused to do so" (A. 41).[18]

[18] Although Judge Murphy first charged the jury that in order to convict petitioner on Count Four, they had to be satisfied beyond a reasonable doubt that " . . . he unlawfully and knowingly failed, neglected and refused to submit such information for which the local board had mailed him a request" (A. 41), Judge Murphy later defined the requisite intent in the language quoted in the text.

The instruction thus permitted a conviction for the failure to return the questionnaire alone without any determination by the jury of whether the information sought by the board was in fact in its possession at the time the questionnaire was mailed or was supplied before the bringing of the charges. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, 326 U.S. 607, 613 (1946). The instruction here was so fundamentally prejudicial as to compel reversal and entry of a judgment of acquittal on this count.

Had the jury been properly instructed, they could reasonably have found that petitioner had supplied the requested information. Petitioner supplied his mailing address in the letter with which he returned the uncompleted questionnaire. He gave information concerning his enrollment at Union Theological Seminary to the F.B.I. agents in May 1967 and to the grand jury and assistant United States Attorney Robinson in November 1967. See Point II, *supra*. The rest of the information petitioner had given the board in a previous questionnaire (Govt. Ex. 4), and he again gave such information in the various forms filled out the day he refused induction (Govt. Ex. 37).

B. *Although Petitioner May Have Technically Violated a Regulation, the Statute Can Reasonably Require Only Substantial Compliance With Orders of the Local Board.*

In failing to return the questionnaire, petitioner undoubtedly violated a Selective Service regulation, 32 C.F.R. 1641.7(b), which requires a registrant to submit in writing all information requested by the board. Although that failure was technically a violation of the Act, §12(a), of the local board, the clear import of the Act and regulations is not to make such a violation criminal.

Count Four charged a failure to provide information and properly was not based on a technical violation of 32 C.F.R. 1641.7(b), even though it did cite that section as one of the authorizations for the count. In fact, it also cited 32 C.F.R. 1641.2(b), which says that a registrant waives any privilege which he does not claim within the required time. When read with 32 C.F.R. 1622.1(c), 1622.10 and 1623.1(b) which together say that a registrant will be placed in Class I-A unless he presents information within the required time justifying his being given another classification, the policy of the Selective Service System emerges clearly. The Act and the regulations place the burden on the registrant to prove his entitlement to a deferment or exemption. *Dickinson* v. *United States,* 346 U.S. 389 (1953). If he neglects to provide that information, he will then forfeit a possible deferment or exemption. See, e.g., *Boyd* v. *United States,* 269 F.2d 607, 611 (9th Cir. 1969) ("Furthermore, deferment is a privilege which may be waived or abandoned by the registrant's acts 'like any other personal privilege' "). However, it is hardly reasonable that Congress intended to make his neglect criminal as well, since the only resulting harm would be to the registrant and not to the system.

This was the reasoning of the court in *Norton* v. *United States,* 179 F.2d 527 (2d Cir. 1950), a case presenting a closely analogous situation. There a young man presented himself for registration, gave the information necessary for his registration, but refused to sign the registration card. In refusing to sign, he violated an explicit regulation —the violation of which was made a crime—which required him to "sign his name, exactly as he usually signs it. . . ." 32 C.F.R. 613.13(b) (now 32 C.F.R. 1613.13(b)). Never-

theless, the court, reading that section in conjunction with the following section, 613.13(c), authorizing the registrar to sign for a registrant who refuses, held:

> "The regulation having provided a substitute for the registrant's signature we believe that the substitute was meant to serve for all purposes, including the condoning of the refusal." *Id.* at 529.

Reading 32 C.F.R. 1641.7(b) with 32 C.F.R. 1641.2(b) and 32 C.F.R. 1622.1(c) suggests a similar resolution in this case. Just as the regulations provided an alternative when Norton refused to sign the registration card, the regulations provided an alternative here when the petitioner refused to return the questionnaire, namely waiver of any deferments and classification in class I-A. That alternative was just as clearly "meant to serve for all purposes, including the condoning of the refusal."

Only this approach to non-prejudicial violations of the regulations by registrants explains the failure to prosecute the many registrants who submit to the draft by deliberately failing to advise their boards of deferments available to them. It also accords with the well-recognized principle in Selective Service cases that violations of the regulations by a local board will invalidate an induction order only where there is some showing of prejudice to the registrant. See, e.g., *United States* v. *Lawson,* 337 F.2d 800 (3d Cir. 1964). Justice and good sense dictate that this be the rule where a registrant's violation of a regulation is only technical.

The statements of Selective Service officials and the reported decisions in fact suggest that this is the principle that has been followed. New York City Selective Service

Headquarters (Govt. Ex. 39, A. 58), did not recommend prosecution for petitioner's failure to return his Current Information Questionnaire. The reported cases of prosecutions for failing to provide information all involve attempts to benefit the registrant—and prejudice Selective Service—by either withholding or supplying incorrect information. Several cases involved a failure to furnish information about a registrant's employment that would have resulted in the loss of the registrant's occupational deferment. *United States* v. *Lembo,* 76 F. Supp. 209 (E.D. Pa.), *rev'd sub. nom. United States* v. *Aleli,* 170 F.2d 18 (3d Cir. 1948); *United States* v. *Weiss,* 65 F. Supp. 556 (E.D.N.Y.), *aff'd* 162 F.2d 447 (2d Cir. 1947), *cert. denied* 332 U.S. 767 (1947); *United States* v. *Wain,* 162 F.2d 60 (2d Cir. 1947); *Stassi* v. *United States,* 152 F.2d 581 (5th Cir. 1945), *cert. denied* 328 U.S. 442 (1946). The other cases involved a failure to keep the registrant's local board informed of the address where mail would reach the registrant. Again, these cases involved failure to furnish information which could have harmed the registrant. *United States* v. *Haug,* 150 F.2d 911 (2d Cir. 1945); *Stumpf* v. *Sanford,* 145 F.2d 271 (5th Cir. 1944); *Bartchy* v. *United States,* 132 F.2d 348 (5th Cir. 1942), reversed for lack of evidence, 319 U.S. 484 (1943). In both categories of cases, the failure to supply information prejudiced the boards' right to classify the registrant I-A.

Although there are no cases directly holding that the failure to provide information not prejudicial to the System is not criminal, the concurring opinion of Judges Learned Hand and Swan in *United States* v. *Rubinstein,* 166 F.2d 249 (2d Cir. 1948), seems to take this position. Cf. *Rich* v. *Hershey,* 303 F. Supp. 177, 181 (D. Colo.), *aff'd*

408 F.2d 944 (10th Cir. 1969). *Bartchy* v. *United States*, 319 U.S. 484 (1943), suggests that the requirement to advise the board of a mailing address is met by substantial compliance. See also, *Estep* v. *United States*, 327 U.S. 114, 145 (1946) (Frankfurter, J., concurring); *United States* v. *Ebey*, 424 F.2d 376 (10th Cir. 1970).

Applying this rule to the petitioner, his conviction cannot stand. All the information which he allegedly failed to provide—except for the mailing address, which he did provide—would have provided the basis for an exemption. Petitioner provided the information for exemption as a divinity student and conscientious objector. See Points I and II, *supra*. Any other deferments to which he may have been entitled had he submitted the requested information he waived, but petitioner committed no crime. Therefore, the Court should reverse the conviction and enter a judgment of acquittal on Count Four.

VI.

If this Court does not direct a judgment of acquittal on Counts Three and Four, the Court should reverse the convictions on Counts Three and Four and remand to the trial court so that the government may determine whether it wishes to press the prosecution on these counts.

Petitioner here received concurrent two-year sentences on four counts. This sentence was admittedly within the trial judge's authority. However, as Judge Feinberg noted, if petitioner had been properly classified I-O or IV-D in September 1967 by his local board, the alleged violation leading to indictment on Count Two would never have occurred and the prosecutions on Counts Three and Four may never have been brought (A. 88-89). Indeed, the Selective Service authorities did not even recommend prosecution on Count Four (Govt. Ex. 39, A. 58-59).

Moreover, Judge Feinberg questioned whether the trial judge or jury would have reached the same results if they had been asked to try a registrant possessing divinity student or conscientious objector status on Counts Three and Four. He also questioned whether the judge, assuming he realized that petitioner should have been classified I-O or IV-D, would have rendered a shorter sentence or possibly probation if petitioner had only been found guilty on Counts Three and Four (A. 89).

If this Court does not reverse the convictions and direct a judgment of acquittal on Counts Three and Four, the Court should reverse the convictions on Counts Three and Four and remand to the trial court so that the government may determine whether it wishes to press the

prosecution on these counts. Petitioner submits that this would be "such appropriate judgment . . . as may be just under the circumstances." 28 U.S.C. §2106; *Bryan* v. *United States,* 338 U.S. 552, 558 (1950).

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below and enter a judgment of acquittal on all four counts of the indictment.

Respectfully submitted,

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* Attorney for petitioner gratefully acknowledges the substantial contribution to the preparation of this Brief made by Mr. Robert L. Robinson, a recent graduate of the Columbia Law School. Petitioner's counsel also acknowledges the valuable assistance of Mr. Edwin J. Oppenheimer of the New York Civil Liberties Union Selective Service and Military Law Panel.

FILE COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR., *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF AMICUS CURIAE ON BEHALF OF
RICHARD KENNETH LEGRANDE

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In the Supreme Court
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OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Movant, Richard Kenneth LeGrande, respectfully moves the Court for permission to file a brief *amicus curiae.*

Movant was indicted on July 1, 1970, in the Northern District of California on a charge of refusing to submit to induction in violation of Title 50 U.S.C. App. section 462. During the time that he was a registrant with Selective Service Local Board No. 57 he filed a timely claim for classification as a conscientious objector. The local board nevertheless classified him 1-A on June 11, 1968, without stating any reason for rejecting his claim. He did not take an administrative appeal. His case is presently scheduled for trial on January 21, 1971.

Movant is faced with the imminent risk that he may be deprived, by application of the rule requiring ex-

haustion of administrative remedies, of the right to defend himself against the criminal charge.

Counsel have obtained the written consent to the filing of an amicus brief both from the Solicitor General of the United States and from petitioner McGee. The originals thereof will be filed with the clerk of this Court, and copies are attached hereto as Appendix A and Appendix B.

The Petition for Certiorari does not discuss these questions: (1) whether the due process clause permits judicial forfeiture of a criminal defense without notice; (2) whether the due process clause permits imposition of criminal sanctions for violation of an unlawful administrative order. These questions were not reached in *McKart v. United States* (1969) 395 U.S. 185. It is of great importance that they be met and decided now. Never before have the Federal Courts suggested that, though innocent of the crime charged, persons may be convicted and imprisoned for reasons extraneous to their innocence or guilt. They do so now. It is a sad degradation of our traditional concepts of justice.

Dated, San Francisco, California,
November 30, 1970.

Respectfully submitted,
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BRIEF OF AMICUS CURIAE

INTRODUCTION

In the case at bar, petitioner McGee was denied the right to defend himself against criminal charges. He was convicted for violation of an unlawful induction order. This result is based on his failure to take an administrative appeal when his local board rejected his claim for exemption as a conscientious objector.

The purpose of this brief is to raise the question whether the forfeiture of a criminal defense without notice deprives the defendant of his liberty without due process of law in violation of the Fifth Amendment.

I. THE MOST FUNDAMENTAL RIGHT UNIVERSALLY RECOGNIZED IN OUR JURISPRUDENCE IS THE RIGHT TO DEFEND AGAINST THE CHARGE OF CRIME.

The right to defend against the charge of crime is fundamental in our jurisprudence. The Fifth Amendment prohibits "deprivation of . . . liberty . . . without due process of law". The Sixth Amendment guarantees various procedural protections which are designed to effectuate that basic right in the context of criminal prosecution.

In draft prosecutions the right to defend by proof that the draft board acted illegally has been recognized for almost a quarter century. *Estep v. United States* (1946) 327 U.S. 114.[1]

[1]It is conceded *arguendo* that the scope of judicial review of draft board actions has been limited to defects which are jurisdictional, e.g., where the board's action has no basis in fact.

The court there found itself unable "to infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency." [327 U.S. at 121-22].

II. THERE IS NOTHING IN THE RECORD TO SUPPORT A FINDING THAT McGEE WAIVED HIS RIGHT TO DEFEND HIMSELF AGAINST SUBSEQUENT CRIMINAL CHARGES.

The court below affirmed McGee's conviction because of his "failure to appeal his I-A classification".[2] Its conclusion involves the concept that, by failing to take an administrative appeal, McGee waived his right to defend himself against subsequent criminal charges.

This conclusion cannot stand because the record is devoid of any evidence and devoid of any finding by the trial court that McGee waived that fundamental right.

The situation is governed by *Johnson v. Zerbst* (1938) 304 U.S. 458. In that case a prisoner sought habeas corpus on the ground that he had been convicted without the assistance of counsel for his defense. The District Court denied relief, the Court of Appeals affirmed, and the Supreme Court reversed. To the Government's argument that Johnson had waived his right to counsel, the court replied:

> There is insistence here that petitioner waived this constitutional right. The District Court did

[2]Petition for Certiorari, Appendix p. 12a.

> not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

The court remanded the case to the District Court for a determination as to whether Johnson competently and intelligently waived his right to counsel [at page 469].

The same principles are applicable here. We are informed by McGee's counsel that the issue of exhaustion of administrative remedies was never mentioned in the District Court. It necessarily follows that the District Court in McGee's case did not consider and made no finding upon the crucial question whether McGee intentionally relinquished his right to defend himself against criminal charges. His conviction cannot stand without such a finding by the District Court.[3]

---

[3]If the court below applied a presumption that when McGee waived his administrative appeal he also waived his right to defend in the event of criminal charges, that presumption is objectionable on three grounds: (a) under *Johnson, supra,* and cases there cited, waiver of such a fundamental right is not presumed; (b) the fact presumed does not rationally follow from the premise; and (c) where a presumption is applied on appeal that was not applied in the trial court, the defendant is deprived of the opportunity to rebut the presumption.

III. ABSENT EVIDENCE AND FINDING OF WAIVER, THE FORFEITURE OF THE RIGHT TO PRESENT A CRIMINAL DEFENSE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Fifth Amendment of the United States Constitution provides in part that no person shall "be deprived of life, liberty, or property, without due process of law". This provision, in its classic application, guarantees reasonable notice and opportunity to defend before criminal punishment is imposed:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence. *In re Oliver* (1948) 333 U.S. 257, 273.

The decision of the court below imposes criminal punishment for violation of an induction order while refusing to hear the defense that the order is illegal.[4] On its face the decision constitutes a departure from classic due process principles, absent evidence and finding that the right to present a criminal defense was waived.

McGee was duly notified, in accordance with Selective Service regulations, that he had the right to appeal his classification.[5] On the other hand, there is no evidence that the local board ever gave him any

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[4]The effect of the decision below is to create a new crime by judicial decree. Having conceded that McGee had established his right to exemption from military service [Petition for Certiorari, Appendix, p. 11a] the court below in effect imposes criminal punishment for the failure to appeal even though the Congress made the right to appeal optional with the registrant. [Military Selective Service Act of 1967, §10(b)(3).]

[5]Petition for Writ of Certiorari, Appendix pp. 3a-4a.

indication that an appeal was mandatory[6] or that unless he filed an appeal he might suffer the forfeiture of his constitutional right to defend himself in the event of a subsequent prosecution. Such a record is totally deficient of any basis for a conclusion that McGee even knew that he might lose, much less intended to waive, his right to judicial review of his classification in the event of a later criminal proceeding.

The decision below therefore rests on a proposition inconsistent with traditional standards of Anglo-American jurisprudence: that a person may by his conduct unwittingly forfeit the right to defend himself in court against subsequent criminal charges.

> There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. [Justice Murphy, concurring opinion in *Estep v. United States* (1946) 327 U.S. 114, 131.]

IV. EVEN IF THE DEFENDANT IN A DRAFT CASE WAIVES HIS RIGHT TO DEFEND, DUE PROCESS FORBIDS THE IMPOSITION OF CRIMINAL SANCTIONS BASED ON THE VIOLATION OF AN UNLAWFUL ORDER.

The court below noted that McGee had filed with his local board a claim for exemption as a conscien-

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[6]Neither statute nor regulation suggests that an administrative appeal is ever mandatory. [Military Selective Service Act of 1967, §10(b)(3); 32 C.F.R. 1626.] *McKart v. United States* (1969) 89 S.Ct. 1657, 1663: "No registrant is required to appeal."

tious objector, and that the local board had rejected the claim without having any basis in fact for so doing.[7] The board's induction order was therefore unlawful. *Estep, supra.*

Since violation of an unlawful order is not a crime, no court should ever impose criminal sanctions for such violation, irrespective of whether the defendant has waived his right to defend.

A conviction so lacking in evidentiary support amounts to denial of due process. *Thompson v. Louisville* (1960) 362 U.S. 199; *Barr v. Columbia* (1964) 378 U.S. 146; *Shuttlesworth v. Birmingham* (1965) 382 U.S. 87; *Garner v. Louisiana* (1961) 368 U.S. 157.

CONCLUSION

For the foregoing reasons the judgment of conviction on count one (failure to submit to induction) should be reversed.

Dated, San Francisco, California,
November 30, 1970.

Respectfully submitted,
NATHAN S. SMITH,
JAMES G. SEELY, JR.,
MARVIN B. HAIKEN,
Attorneys for Amicus Curiae
Richard Kenneth LeGrande

(Appendices A and B Follow)

---

[7]Petition for Certiorari, Appendix p. 11a.

Appendix A

Letterhead of
New York Civil Liberties Union

November 18, 1970

Nathan S. Smith, Esq.,
220 Bush Street, Room 976
San Francisco, California 94101

Re: *McGee v. United States*, No. 362
October Term, 1970

Dear Mr. Smith:

On behalf of petitioner, I hereby consent to your filing an *amicus curiae* brief in the above-captioned case.

Sincerely yours,
/s/ Alan H. Levine
Alan H. Levine

AHL:SK

Appendix B

Letterhead of
Office of the Solicitor General
Washington, D.C. 20530

November 25, 1970

AIR MAIL
Nathan S. Smith, Esq.,
220 Bush Street,
San Francisco, California 94104

Re: *McGee v. United States,* No. 362
October Term, 1970

Dear Mr. Smith,

In response to your letter of November 23, I hereby consent to your filing a brief amicus curiae in the above case.

Very truly yours,
/s/ Erwin N. Griswold
Erwin N. Griswold
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the court of appeals (A. 61–89)[1] are reported at 426 F. 2d 691. The opinion of the district court denying petitioner's motion to dismiss (A. 7–16) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 90–91) was entered on March 31, 1970. A petition for rehearing with a suggestion of rehearing *en banc* was

[1] "A." refers to Appendix in this Court; "Tr." refers to the trial transcript; "G. Ex." refers to government trial exhibits, consisting of excerpts from petitioner's Selective Service file. These materials are on file with the Clerk.

denied on May 7, 1970 (A. 92–93). On June 1, 1970, Mr. Justice Harlan extended petitioner's time for filing a petition for a writ of certiorari until July 6, 1970, and the petition was filed on that date. This Court granted certiorari on October 19, 1970 (A. 94). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's intentional failure to pursue his conscientious objector claim before his local draft board and to appeal from its denial by the board precluded him from challenging that denial at his trial for refusal to submit to induction.

2. Whether petitioner can raise as a defense at his trial a contention that he should have been exempted as a ministerial student when he never requested such an exemption from his local board and never demonstrated, even at trial, that he in fact qualified for such an exemption.

3. Whether petitioner's conviction for wilfully refusing to submit requested information to his local board is valid and whether the court of appeals in any event properly declined to review this conviction in view of the concurrent sentence.

4. If the Court should determine that petitioner was entitled to an exemption, whether that gives him a defense to prosecution for failure to report as ordered for a pre-induction physical examination and for failure to maintain his Notice of Classification in his possession.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a four-count indictment charging that he knowingly failed to submit to induction into the Armed Forces (Count I), report for a scheduled pre-induction physical examination (Count II), keep in his possession a valid Notice of Classification (SSS Form 110) (Count III), and provide his local board with information concerning his draft status as requested in a Current Information Questionnaire (SSS Form 127) (Count IV), all in violation of 50 U.S.C. App. 462(a) and various designated Selective Service regulations[2] (A. 4–6; Tr. 299). On January 16, 1969, he was sentenced to two years' imprisonment on each count, the terms to run concurrently (A. 2). The court of appeals affirmed, one judge dissenting (A. 61–91).

1. On September 7, 1961, following his eighteenth birthday, petitioner registered with his local Selective Service board in New York City and informed the board that he was a student at Cathedral College of St. Joseph's Seminary, preparing for the ministry under the direction of the Roman Catholic Church (G. Ex. 3, p. 4, A. 44; G. Ex. 1). In August 1963, he advised the board in a Current Information Ques-

[2] See 32 C.F.R. 1632.14 (duty of registrant to report for and submit to induction); 32 C.F.R. 1628.16 (duty to report for and submit to pre-induction physical examination); 32 C.F.R. 1623.5 (duty to maintain possession at all times of valid Notice of Classification showing current classification); 32 C.F.R. 1641.7(b) (duty to submit in writing information concerning draft status requested by local board).

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tionnaire and accompanying letter that he had taken a leave of absence from that institution the preceding January for financial reasons; that he intended to resume his studies there in September 1964; and that he had been working in the interim as a clerk in a law firm while attending night classes at Hunter College (G. Ex. 4). In September 1963, he was classified I–A (G. Ex. 3, p. 8, A. 44).

In August 1964, petitioner was ordered to take, and he took and passed, a pre-induction physical examination (G. Ex. 3, p. 8, A. 44; G. Exs. 5, 5A). Shortly thereafter, he advised the local board that he had registered at the University of Rochester in a pre-matriculation program that would lead ultimately to a Bachelor of Arts degree. Seeking to obtain a "delayed draft status," he asked the board to advise him whether he should remain in Class I–A and have his induction delayed until the completion of his studies or request II–S (student deferment) status until his graduation (G. Ex. 6). The board responded that, since petitioner's file did not contain a Student Certificate (SSS Form 109) from his university certifying his student status, one should be forwarded (G. Ex. 7). The requested certificate was received and, in October 1964, petitioner was classified II–S (G. Ex. 3, p. 8, A. 44; G. Ex. 8). Except for a brief period in 1965 not here pertinent, he retained that classification until September 1967 (G. Ex. 3, pp. 8-9, A. 44).

On February 12, 1966, while a third-year student at Rochester, petitioner advised his local board that he wished to declare himself a conscientious objector to

war (G. Ex. 13). The board sent him SSS Form 150 (Special Form for Conscientious Objector) which petitioner completed and returned (G. Ex. 16, A. 48).[3] In filling out the form, petitioner crossed out both the printed statement of claim to exemption from combatant service only ("statement A") and the printed statement of claim to exemption from both combatant and noncombatant military service ("statement B"), explaining that "[n]either A, nor B are acceptable" (G. Ex. 16, p. 1, A. 48). In an attached "additional claim and statement," he stated that he was con-

[3] Petitioner stated in the Form that he believed "in a personal Supreme Being to whom obligation is superior when duties of human relations are considered"; that he felt that "taking part in any form of military operation indicates an approval/consent situation repugnant to [his] belief in duties consequent to love and service of God and fellow man"; and that his beliefs derived "from usual religious indoctrination and rearing of a Roman Catholic whose home is a religiously oriented one * * *." He believed in "no use of force beyond the personal physical restraint—without any material arms being used—of any individual bent on harming another person when verbal and moral force of example have been exhausted." In response to a request that he describe the actions of his life which he believed most conspicuously demonstrated the consistency and depth of his religious convictions, he said that he had determined on a vocation to the religious life at an early age; that he had spent 5½ years in an official minor seminary of the Catholic Church; that he had left the seminary in order to "live more closely associated with the concrete situation of modern man while keeping a sense of vocation and dedication to God and men clearly in sight"; and that it was his intention to "continue on to actual ordained Priesthood" (G. Ex. 16, pp. 1–2, A. 48).

The majority below acknowledged that petitioner had submitted a *prima facie* claim to conscientious objector status under the statute (50 U.S.C. App. 456(j)), and that finding is not disputed here.

scientiously opposed to, and claimed exemption from, "obligatory compensatory service in civilian work" as well as military service (G. Ex. 16, A. 48).

On March 23, 1966, the clerk of the local board wrote petitioner that the "recent evidence" he had submitted had been reviewed by the board and the board had decided it did not justify a reopening of his case and reconsideration of his II–S classification; however, he was told his claim to conscientious objector status would be considered when he no longer qualified for a student deferment (A. 62–63; G. Ex. 18). According to the official minutes of the board, this action was taken following a 4–0 vote of the board not to reopen (G. Ex. 3, p. 9, A. 44). Petitioner took no further action in the matter.

Thereafter, petitioner requested a renewal of his II–S classification (A. 63; G. Exs. 21, 22). The Colgate Rochester Divinity School certified to the local board in September 1966 that petitioner was carrying seven hours of course work at that school, in addition to his regular work at the University of Rochester, which would be credited toward his Rochester degree (G. Ex. 23). Petitioner's II–S classification was thus renewed in October 1966 (G. Ex. 3, p. 9, A. 44).

On April 15, 1967, while a senior at Rochester, petitioner wrote a letter to President Johnson, enclosing remnants of his torn and burnt registration certificate (SSS Form 2) and classification notice (SSS Form 110) (G. Ex. 25, A. 50; Tr. 115–117). He stated that, though he had been "accepted for graduate study in a program where [he] would probably qualify for the theological deferment," he felt compelled to "sever

every link with violence and war" and adopt a position of "non-cooperation with the military-industrial complex which seems to be dictating our international policy" (G. Ex. 25, A. 50). Petitioner's local board received a copy of this letter from the New York City Selective Service Headquarters, to which it had been referred through official channels (G. Ex. 25, A. 50; G. Ex. 3, p. 9, A. 44). In May 1967, the board considered, but decided against, reopening petitioner's II–S classification, retaining him in that status (A. 63; G. Ex. 3, p. 9, A. 44).

Petitioner graduated from the University of Rochester with a Bachelor of Science degree in June 1967 (G. Ex. 28; Tr. 113). On July 3, the board sent him a Current Information Questionnaire (SSS Form 127), with the instruction that he return it by July 13 (G. Ex. 30, A. 52). It was explained on the face of the Form that the law required the recipient to "fill out and return this questionnaire" in order that the board might have current information needed to classify him. The information sought included specifics as to the registrant's educational attainments, whether or not he would be a full-time student during the following semester, and, if so, at what school. The registrant was also told that he might attach any additional information he believed should be brought to the board's attention (*ibid*).

On July 23, 1967, petitioner returned the questionnaire unanswered. In an accompanying letter, he advised the board that he did not intend to respond and that any further communications from the board would be returned unopened, "consistent with my be-

lief that cooperation is approval of actions and policy which in conscience I can have nothing to do with" (G. Ex. 30, Ltr. of 7/23/67, A. 52).

Petitioner was reclassified I–A on September 19, 1967 (G. Ex. 3, p. 9, A. 44). The following day he was mailed a Notice of Classification (SSS Form 110) and a letter advising him that he had a right to request a personal appearance before the board or to take an appeal within 30 days, that the board had a government appeal agent available to aid him with such appearance, appeal, or other procedural right, and that the appeal agent or his representative would give petitioner free legal counsel on any Selective Service matter (A. 63–64; G. Ex. 31). Petitioner returned the communication unopened, writing on the envelope "Refused pursuant to previous declaration and notification" (A. 64; G. Ex. 32).

On October 4, 1967, petitioner was ordered to report for a pre-induction physical examination on October 18. He returned the order to the board unopened, similarly writing on the envelope "Refused pursuant to previous notification and statement," and failed to report for the examination (G. Ex. 33, A. 54). On November 21, 1967, he was declared delinquent and the following day was sent a delinquency notice; however, this too was returned unopened, the envelope similarly endorsed (G. Ex. 3, last page, A. 44; G. Ex. 34). He was ordered on January 11, 1968, to report for induction on January 29. This time he did report on the scheduled date, took and passed a physical examination, and was found qualified for induction. He refused, however, to take the symbolic step for-

ward when called, giving as his reason his "moral and religious beliefs" (G. Ex. 3, last page, A. 44; G. Ex. 38, A. 56; G. Exs. 35, 37; Tr. 61–62, 136–137).

Prior to receiving his order to report, but within the thirty-day period within which to appeal his I–A classification, petitioner had on September 27, 1967, matriculated at Union Theological Seminary, a non-denominational institution to which he had been recommended by his parish priest (A. 22, 64; Tr. 85, 90–91, 93–94). However, at no time did he submit to his local board a request for a IV–D (ministerial student) classification, nor did he ever advise the board that he was attending the institution (A. 37, 64, 68). Moreover, there was no evidence at trial that petitioner was preparing for the ministry under the direction either of the Catholic Church or of any other church or religious organization, as would be required for an exemption under Section 6(g), 50 U.S.C. App. 456(g); while there were other Catholic students at the Seminary, who had expressed an intention of becoming priests, most of these were enrollees at Catholic seminaries who were merely taking courses at Union as non-matriculants (A. 22–23).

2. At petitioner's trial, Jerome Lande, the chairman of the local board, was questioned (as a defense witness) outside the presence of the jury about the initial denial in March 1966 of petitioner's request for conscientious objector status, and also about the subsequent reclassification, in September 1967, from II–S to I–A. Mr. Lande testified that when the conscientious objector application was originally filed, he thought "there weren't sufficient facts in that to motivate me to grant

the registrant the request he sought" (A. 26). When shown Government Exhibit 18—the letter of March 23, 1966, from the clerk of the local board to petitioner advising him that his conscientious objector claim would be considered when he no longer qualified for a student classification—the chairman denied having instructed the clerk so to inform petitioner (A. 26–27). He said he had denied the application "because the young man was attending college and in my judgment he rated a 2S qualification [*sic*] which we proceeded to give him" (A. 27).[4] Asked by counsel if he had not previously stated that the denial was due to petitioner's "beliefs," the chairman testified: "I did not say anything at all about his beliefs. * * * I said in my opinion what he set forth did not motivate me to grant him the relief he sought" (A. 27). Although the minutes of the board's actions, as recorded on petitioner's classification questionnaire, indicate that the decision not to reopen was by a 4–0 vote (G. Ex. 3, p. 9, A. 44), Mr. Lande testified that the determination was made by him in his individual capacity as chairman (A. 27–28, 30–31).

When petitioner was reclassified I–A in September 1967, Mr. Lande testified, all members of the board participated and the 5–0 decision was taken after "we again reviewed what appeared in the file" (A. 29, 34–35). "Based on our previous determination that his request for conscientious objection status was denied,"

[4] When government counsel, in an ensuing colloquy, observed to the court, "Your Honor, I think Mr. Lande has testified that Mr. McGee was a student at that time and therefore they gave him a 2S classification," the chairman said, "I did state that" (A. 27).

the chairman said, "we had no alternative at that time but to give him a 1A, which we did" (A. 35). The following exchange between defense counsel and the chairman then occurred (A. 35):

> Q. You didn't consider the conscientious objector claim again because it had been denied previously?
>
> A. Yes——

Mr. Lande's answer was interrupted by government counsel, who interjected: "The witness has already testified he did consider" (A. 35). The chairman later made clear that the entire board "reviewed the record of the young man's case when we gave him the 1A and all pertinent information therein contained" (A. 36-37).

A motion for acquittal, based in part on the claimed failure by the board to "reconsider defendant's application for conscientious objector [status]" on the occasion of his September 1967 reclassification to I–A (A. 40), was denied (Tr. 245). Following the verdict, the trial court found as a fact that the local board "considered the defendant's application for a conscientious objector status" when it reclassified him I–A on September 19, 1967 (A. 41–42).

SUMMARY OF ARGUMENT

I.

A. More than 25 years ago, this Court established, in *Falbo* v. *United States,* 320 U.S. 549, and *Estep* v. *United States,* 327 U.S. 114, that a Selective Service registrant is required, except in rare cases involv-

ing unusual circumstances, to exhaust his administrative remedies; his failure to do so precludes a challenge to the validity of his assigned classification in defense to a criminal prosecution for failure to submit to induction. The recent decision in *McKart* v. *United States*, 395 U.S. 185, does not abrogate that general principle. There, in declining to apply the exhaustion doctrine in the particular situation presented, the Court relied on the fact that the question on which McKart's classification had depended—the meaning of the "sole surviving son" exemption of 50 U.S.C. App. 456(o)—was solely one of law, which the courts could resolve without further assistance or enlightenment from the administrative boards. However, it expressly noted that the result might well be otherwise where the failure to take advantage of administrative remedies deprives the Selective Service System of an opportunity to assess a claim to exempt status which by nature calls for special "expertise or the exercise of discretion, both by the local boards and the appeal boards" (395 U.S. at 198).

This is just such a case. The classification question involved here is not solely one of statutory interpretation; its resolution, instead, requires precisely the kind of factual analysis that Congress intended should be left, in the first instance, to the discretion and expertise of the Selective Service System. Whether petitioner is entitled to conscientious objector status turns essentially on the sincerity of his beliefs. Yet, petitioner's failure to contest his classification before his local board or to appeal adminis-

tratively effectively denied the administrative system an opportunity to correct its alleged error by passing on that aspect of his claim, or to apply its full expertise to the evaluation of his written submission.

If registrants seeking exemption as conscientious objectors are permitted thus to bypass with impunity the established administrative machinery for fact-finding and review, there exists a real possibility that the effectiveness of the System will be weakened. For, it will enable such registrants, as happened in this case, to bring before the courts, in the context of criminal prosecutions, *prima facie* claims to exempt status without having them meaningfully examined by the administrative agency from the point of view of the registrant's sincerity, and thus, on a carefully drawn SSS Form 150, be virtually assured of acquittal on the ground that the record shows "no basis in fact" for denial of a conscientious objector exemption.

B. Petitioner's additional contention that he was erroneously denied a IV–D (ministerial student) classification on the basis of his matriculation at Union Theological Seminary in September 1967, a few months before he was ordered to report for induction, is without merit. Not only did he never request such an exemption, but, indeed, petitioner never even advised the board that he was attending the institution in question. Thus, with respect to his IV–D claim, petitioner failed not only to exhaust his administrative remedies, but even to invoke them in the first instance.

Moreover, even assuming such a claim had properly been placed before the the local board, petitioner would

not have been entitled to the classification. For, to qualify as a ministerial student, a registrant must be satisfactorily pursuing a full-time course of instruction in a recognized divinity school *and* be "preparing for the ministry under the direction of" a recognized church or religious organization (50 U.S.C. App. 456(g); 32 C.F.R. 1622.43(a)(3). Even at trial, when petitioner first claimed this exemption and evidence on the issue was liberally received, there was no proof that the latter requirement was met.

II.

A. Affirmance of Count I would obviate consideration of the other counts. Petitioner's challenge to his convictions on Counts II (failure to report for his pre-induction physical examination) and III (failure to keep in his possession his I–A Notice of Classification) both presuppose the invalidity of the I–A classification upon which the Count I conviction rests. With respect to Count IV (refusal to furnish the local board with the information requested in the Current Information Questionnaire), this Court could appropriately decline to consider it under the concurrent sentence doctrine if the basic conviction for failure to submit to induction is affirmed.

B. Even assuming this Court should reverse petitioner's basic conviction for failure to submit, the convictions on the subsidiary counts should stand. A registrant is not relieved of his obligation to obey an order to report for a physical examination merely because his classification is invalid. Nor, for that reason, can it reasonably be maintained that he has no

obligation to retain possession of the Notice of Classification. And the final contention by petitioner—that his deliberate failure to provide his local board with requested information can be disregarded as nothing more than a "technical" violation—is equally without merit. There is, however, no cause for this Court to decide these questions even if petitioner's basic conviction is reversed. Since the issues raised with respect to each of these subsidiary counts are not of such import as to require this Court's immediate attention, it would be entirely appropriate to remand them for consideration by the court of appeals.

ARGUMENT

I. PETITIONER'S CONVICTION ON COUNT I, FOR FAILURE TO SUBMIT TO INDUCTION, IS VALID

The Selective Service System was designed by Congress for the purpose of mobilizing the nation's manpower in an orderly and efficient manner, with the least possible recourse to the courts on questions of classification.[5] To this end, Congress and the President have devised an elaborate administrative appeal machinery to ensure, as far as possible, that errors in

[5] Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 460(b)(3)) provides in pertinent part:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction * * *. *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards and the President only when there is no basis in fact for the classification assigned to such registrant."

classification are corrected administratively within the System.[6] See *United States* v. *Palmer*, 223 F. 2d 893, 896 (C.A. 3), certiorari denied, 350 U.S. 873.

This Court has consistently shunned interference with that carefully constructed administrative review process. Thus, in *Estep* v. *United States*, 327 U.S. 114,

[6] The pertinent provisions of the statute and the regulations which establish this administrative review machinery include, *inter alia*, Sections 10(b)(2) and 10(b)(3) of the Selective Service Act (50 U.S.C. App. 460(b)(2) and (3)), as amended, which contain general provisions relating to State Directors, State Appeal Boards, and review by the President or his delegate (see 50 U.S.C. App. 460(c)), and a number of sections of the Selective Service System regulations, including 32 C.F.R. 1604.6 (creating and prescribing the duties of the National Selective Service Appeal Board), 32 C.F.R. 1604.21 *et seq.* (relating to the organization and composition of State Appeal Boards), 32 C.F.R. 1604.71 (providing for the appointment and prescribing the duties of government appeal agents), 32 C.F.R. 1624.1 *et seq.* (relating to a registrant's appearance before his local board), 32 C.F.R. 1625.1 *et seq.* (providing for the reopening and reconsideration of a registrant's classification by his local board), and, most particularly, 32 C.F.R. 1626.1 *et seq.*, 1627.1 *et seq.*, and 1628.1 *et seq.*, which provide, respectively, for appeals to State Appeal Boards, appeals to the President (whose authority is exercised by the National Appeal Board), and physical examinations of registrants prior to being ordered to report for induction, and the whole range of procedures relating to these matters.

It should be noted that the standard Notice of Classification (SSS Form 110) provided to all registrants upon their classification or reclassification (see 32 C.F.R. 1623.4) contains a detailed explanation of the registrant's right to take an administrative appeal (see A. 62–63), including information regarding both the timing and manner of appealing a classification to both the State and National Appeal Boards. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 379.

122–123, it held that "[t]he decisions of the local boards made in conformity with the regulations are final even though they may be erroneous"; that they may be overturned "only if there is no basis in fact for the classification" given the registrant. This was confirmed in *Witmer* v. *United States*, 348 U.S. 375, 380–381, where the Court stated that "it is not for the courts to sit as super draft boards, substituting their judgments * * * for those of the designated agencies." See also *Dickinson* v. *United States*, 346 U.S. 389, 396.[7] Indeed, these administrative processes were the conceptual cornerstone for this Court's unanimous decision only last term in *Mulloy* v. *United States*, 398 U.S. 410, 416. There, in requiring local boards to reopen and permit appeals within the System of *prima facie* claims to exemption or deferment tendered prior to the mailing of an induction notice, this Court was guided primarily by the principle that "the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System."

In the instant case, it is undisputed that these administrative processes were cut short, not by any

[7] In *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 238, this Court permitted pre-induction judicial review of action that was "a clear departure by the Board from its statutory mandate" in denying an exemption expressly granted by statute; the situation involved "no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." However, the Court went on to state: "Our construction leaves § 10(b)(3) unimpaired in the normal operations of the Act." See *Clark* v. *Gabriel*, 393 U.S. 256.

default of the Selective Service System, but rather because the registrant affirmatively elected to ignore altogether, after his student deferment expired in 1967, the administrative machinery established by Congress and the President. His inaction cannot on this record be attributed to inadvertence, ignorance or mistake, but must instead be recognized as a deliberate refusal to contest and appeal the classification given him by his local board within the Selective Service System (*supra*, pp. 6–8).[8]

A. PETITIONER'S FAILURE TO CONTEST HIS CLASSIFICATION BEFORE HIS LOCAL BOARD OR TO APPEAL ADMINISTRATIVELY PRECLUDES HIS ATTACK ON THAT CLASSIFICATION IN DEFENSE TO A CRIMINAL PROSECUTION FOR REFUSAL TO SUBMIT TO INDUCTION

More than twenty-five years ago, in a criminal prosecution for failure to obey an order to report for civilian work of national importance, this Court, in *Falbo* v.

[8] It is interesting to note that a recent law review comment which proposes statutory expansion of the right to judicial review of Selective Service classifications would not extend the right of judicial review of a classification to a registrant who deliberately ignores possible remedies within the system. Note, *Judicial Review of Selective Service Action: A Need for Reform*, 56 Calif. L. Rev. 448, 463 (1968). That article states: "When the United States Attorney prosecutes a registrant for refusing to submit to induction, the registrant should be permitted to assert the defense of misclassification or unfairness unless he has deliberately or wantonly failed to exhaust his administrative remedies. Because the registrant faces a possible jail sentence, the courts should review the Selective Service action for reversible error to ensure that the registrant is not unjustly convicted of a federal crime. This would not confound any policies underlying the exhaustion doctrine because the courts would not review a classification when the registrant has deliberately or wantonly ignored possible remedies within the system."

United States, 320 U.S. 549, refused to hear a defense of misclassification because the registrant had failed to take all the steps prescribed in the administrative process. Subsequently, when such a defense was heard in *Estep* v. *United States,* 327 U.S. 114, the decision was explained in light of the earlier case on the ground that Falbo had not "exhausted his administrative remedies," whereas Estep "had pursued [his] administrative remedies to the end" (327 U.S. at 123). Following this rationale, the Court has since repeatedly given explicit recognition to the continuing vitality of the exhaustion requirement in Selective Service cases.[9] See, *e.g., Billings* v. *Truesdell,* 321 U.S. 542, 558; *Gibson* v. *United States,* 329 U.S. 338, 349–350; *Sunal* v. *Large,* 332 U.S. 174, 176; *Cox* v. *United States,* 332 U.S. 442, 445, 448; *Witmer* v. *United States,* 348 U.S. 375, 377. See also *Oestereich*

[9] Similarly, the courts of appeals had uniformly held that except in rare cases involving unusual circumstances a registrant's disregard of the administrative appellate processes prevents him from challenging his classification in the courts. See, *e.g.*, among the more recent decisions, *Edwards* v. *United States*, 395 F. 2d 453, 454 (C.A. 9), certiorari denied, 393 U.S. 845; *Kidd* v. *United States*, 386 F. 2d 422, 423 (C.A. 10); *United States* v. *Kurki*, 384 F. 2d 905, 907 (C.A. 7), certiorari denied, 390 U.S. 926; *Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Noland* v. *United States*, 380 F. 2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945. The principle was relaxed in *Donato* v. *United States*, 302 F. 2d 468, 470 (C.A. 9), due to highly unusual circumstances beyond the registrant's control which prevented an administrative appeal. This also was the basis for the decision in *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8).

v. *Selective Service Board,* 393 U.S. 233, 235–236 n. 5; *Clark* v. *Gabriel,* 393 U.S. 256, 259.[10]

The issue whether a registrant's wilful disregard of the administrative appellate processes prevents him from challenging his classification in the courts was again considered recently in *McKart* v. *United States,* 395 U.S. 185. There, the Court carefully re-examined the reasons for the exhaustion doctrine, enunciated broad guidelines for its future application, and determined only that, in the particular circumstances of that case, the equities required relaxation of the principle.

In *McKart,* the question arose because the registrant, who had claimed and been denied by his local board exemption as a "sole surviving son" under Section 6(o) of the Selective Service Act (50 U.S.C. App. 456(o)), failed to seek an administrative appeal of

[10] *Oestereich* and *Gabriel* involved the question of the availability of pre-induction review of allegedly unlawful classifications, as did *Breen* v. *Selective Service Board,* 396 U.S. 460. Whether Section 10(b)(3) of the Act precludes such pre-induction review in particular situations is, of course, a question of interpreting the legislative intent underlying that section; that is not the same as the question whether exhaustion of administrative remedies would be required in a similar situation. It is significant that the Court in *Oestereich* noted that there had been exhaustion of administrative remedies there, in that the registrant "took an administrative appeal and lost" (393 U.S. at 235). In this regard, see also Mr. Justice Harlan's concurring opinion (393 U.S. at 244–245 n. 7), which stated that "a registrant making such a claim [of a statute's or regulation's invalidity] may [not] come into court before he has exhausted his administrative appeals, for the System may decide in his favor on other grounds, obviating the need for further review," but pointed out that "[p]etitioner here has exhausted available remedies." And see dissenting opinion by Mr. Justice Stewart, 393 U.S. at 245, 246–249.

his I–A classification. He, like petitioner in the instant case, explicitly refused to have anything to do with the Selective Service System after filing his claim to exempt status (395 U.S. at 188); McKart was ordered to report for induction and failed to do so. He was prosecuted under 50 U.S.C. App. 462 and raised as a defense the invalidity of his I–A classification.

Noting that the doctrine of exhaustion of administrative remedies is of judicial origin and thus "like most judicial doctrines, subject to numerous exceptions" (395 U.S. at 193), this Court declared that its application, in the absence of an express statutory provision on exhaustion,[11] turns on whether, in a particular situation, "the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review" (395 U.S. at 197). Such a governmental interest may arise from the circumstances of a particular case, or "[e]ven if there is no such compelling interest when [an individual] case is viewed in isolation, we must also ask whether allowing all similarly situated registrants to bypass administrative appeal procedures would seriously impair the Selective Service System's ability to perform its functions" (*ibid.*).

In *McKart*, the balance was struck in favor of the registrant. Since the issue on which McKart's proper classification had depended—the meaning of the "sole surviving son" exemption of 50 U.S.C. App. 456(o)—was "solely one of statutory interpretation" (395 U.S.

[11] The Act was similarly silent on this point when petitioner was reclassified I–A in the instant case, and there has been no pertinent change since then (see n. 5 *supra*).

at 197–198), and thus was not the type of question on which the judiciary could expect significant further assistance or enlightenment from the administrative boards,[12] the Court concluded that the equities, on balance, favored not applying the exhaustion doctrine on the particular facts of that case.

The holding, however, is a narrow one; by its terms, it "does not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System" (395 U.S. at 200). Where such failure deprives the System of an opportunity to assess a claim to exempt status which by nature calls for special "expertise or the exercise of discretion, both by the local boards and the appeal boards" (395 U.S. at 198, 200), the Court observed that "it may be proper to require a registrant to carry his case through the administrative process before he comes into court" (395 U.S. at 200).[13] In this regard, special mention was made in the margin of the *McKart* opinion (395 U.S. at 198, n. 16) of the claim before the Court in the instant case:

> Conscientious objector claims * * * would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service

[12] Mr. Justice White's concurring opinion noted, further, that there had been "ratification by the State and National Directors of the position taken by petitioner's local board." 395 U.S. at 207.

[13] In distinguishing *Falbo*, *Estep* and their progeny (pp. 18-20, *supra*), the Court noted that those cases had all involved ministerial or conscientious objector claims, that is, "claims that may well have to be pursued through the administrative procedures" established under the Act (395 U.S. at 201).

> System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew. 32 C.F.R. § 1626.26. The Selective Service System is empowered by Congress to make such discretionary determinations and only the local and appeal boards have the necessary expertise. * * * [14]

We turn then to the question pointedly left open by *McKart*—whether the exhaustion of administrative remedies doctrine has continuing vitality in Selective Service cases involving conscientious objector claims.

Petitioner contends (Br. 28–33) that the failure of Congress to require registrants to raise all their claims before the appeal boards (*supra*, n. 11) is dispositive of the issue; absent a specific statutory mandate, he

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[14] Consistent with its reservation of conscientious objector cases from the rule of *McKart*, the Court, in *McNeil* v. *United States*, 395 U.S. 463, remanded, *United States* v. *McNeil*, 401 F. 2d 527 (C.A. 4) (a decision—pending on petition for certiorari when *McKart* was decided—in which the exhaustion rule had been applied to the denial of a C.O. claim) to the district court for further consideration in light of *McKart*. There is no warrant for petitioner's assumption (Pet. 13) that the Court, in thus summarily remanding *McNeil*, prejudged the issue which *McKart* had left open. Moreover, the government, in its memorandum to this Court in *McNeil*, had pointed out that, contrary to the court of appeals' assumption in that case, the registrant arguably gave adequate administrative notice of his wish to appeal, so that disposition of the case under the failure-to-exhaust-remedies rationale might have been inappropriate (Memorandum for the United States, No. 1048 Misc., Oct. Term, 1968, pp. 5–6). The government, accordingly, had itself suggested the necessity for remand prior to the decision in *McKart*.

argues, the courts cannot invoke the exhaustion doctrine to bar a defense to criminal prosecution. This contention was considered by the Court in *McKart* (395 U.S. at 197; *id.* at 206 (Mr. Justice White, concurring)) and rejected as a basis for refusing to apply the doctrine in that case (395 U.S. at 193). Plainly, wholesale abrogation of the exhaustion principle in Selective Service cases would be no more appropriate than its undiscriminating application (see *supra*, n. 9). Congress has chosen to commit the resolution of draft classification questions in the first instance to the discretion and expertise of local and appeal boards. *Estep* v. *United States, supra;* and see *Oestereich* v. *United States,* 393 U.S. at 245, 246–249 (Mr. Justice Stewart, dissenting). In so doing, it has carefully circumscribed the scope of judicial review of the administrative determination (pp. 15–17, *supra*). Within this statutory framework, the exhaustion doctrine serves an important and useful function; when properly applied, it prevents improper encroachment of the judicial branch into an area reserved for the Executive through a particular agency. It is, as this Court pointed out in *McKart* (395 U.S. at 194), "an expression of executive and administrative autonomy" on matters legislatively assigned to agency discretion or expertise.

Analysis of conscientious objector claims is particularly suited to the exercise of this discretionary power granted local and appeal boards by Congress, since it depends in large part on an appraisal of the registrant's subjective state of mind, "the sincerity of the beliefs described in his SSS Form 150." *Lockhart* v. *United States,* 420 F. 2d 1143, 1145 (C.A. 9); see

Witmer v. *United States*, 348 U.S. 375. When, as happened in the instant case, the registrant deliberately deprives the administrative agency of an opportunity to go beyond the four corners of the application in order to bring its recognized expertise (pp. 22–23, *supra*) to bear on the question whether the asserted beliefs are "truly held" (cf. *United States* v. *Seeger*, 380 U.S. 163, 185), we submit that the interests embodied in the exhaustion rule are sufficiently strong to compel its application.

The interests to be considered were summarized by this Court in *McKart* (395 U.S. at 194–195) in the following manner: (1) "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"; (2) judicial efficiency is furthered by the fact that a "complaining party may be successful in vindicating his rights in the administrative process," with the consequence that "[i]f he is required to pursue his administrative remedies, the courts may never have to intervene"; (3) "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors"; and (4) "frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." All four considerations support an application of the exhaustion doctrine in the instant case.

This Court has long recognized that "the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form." *Witmer* v. *United*

States, 348 U.S. 375, 381. Manifestly, therefore, the classification question involved here is not "solely one of statutory interpretation" (395 U.S. at 197–198); its resolution, instead, requires precisely the kind of factual analysis that Congress intended should be left, in the first instance, to the discretion and expertise of the Selective Service System. See *Thompson* v. *United States,* 380 F. 2d 86 (C.A. 10); *Lockhart* v. *United States,* 420 F. 2d 1143 (C.A. 9). Petitioner's failure to appear personally before his local board, to confer with the government appeal agent, though he was afforded ample opportunity to do so (*supra,* p. 8),[15] or to appeal the denial of his conscientious objector claim within the System,[16] effectively denied the adminis-

[15] This case is unlike *United States* v. *Davis,* 413 F. 2d 148 (C.A. 4), where the failure of the local board to comply with its duty to advise the registrant of the availability of a government appeal agent to apprise him of his rights, including his right of appeal (413 F. 2d at 149–150), was held to create "special circumstances" sufficient to "excuse the registrant from the ordinary consequences of his failure to administratively appeal" (*id.* at 151; see *supra,* n. 9). Here, the notice found lacking in *Davis* was contained in the communication which the local board sent to petitioner when he was reclassified I-A and which petitioner returned to the board unopened. Thus, *Davis* cannot avail petitioner, "who had advised the local board in no uncertain terms that he would not read anything they sent him, and would not have appealed no matter what he was told" (A. 78).

[16] The majority below found (A. 74–75) that the local board had passed on the merits of McGee's conscientious objector claim at the time it reclassified him I-A in 1967. If the denial was without any basis on the facts submitted in McGee's SSS Form 150—and it is conceded that the form presented *a prima*

trative system an opportunity to correct its alleged error by making factual findings essential to determination of his claim, as well as denying it a full opportunity to apply its expertise to the evaluation of his written submission.[17]

The purpose, then, in requiring adherence to the prescribed administrative review procedures here is both

facie claim—this is precisely the type of error which the personal appearance and administrative appeal are designed to expose. It is well recognized that appeal boards do not perform merely a reviewing function; by specific regulation, they classify independently and *de novo*. 32 C.F.R. 1626.26(a). See *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8), and cases there cited. If they are presented with a local board denial of a *prima facie* claim, where on the record before them it is unclear, as here, whether an evaluation has been made of the registrant's sincerity, appeal boards can, if in their discretion it seems appropriate, grant the conscientious objector exemption, and that action "completely supersedes the action of the local board," *Clay* v. *United States*, 397 F. 2d 901, 913 (C.A. 5), vacated and remanded on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310; *United States* v. *Chodorski*, 240 F. 2d 590, 591–592 (C.A. 7), certiorari denied, 353 U.S. 950; or, alternatively, they can suggest that the local board conduct a personal interview to ascertain the truth and sincerity of the professed beliefs set forth in the SSS Form 150. Plainly, either course would have enabled the agency to discover and correct any errors it might have committed and, quite possibly, as pointed out below (A. 73), would have led "to McGee's obtaining a I–O classification and have avoided the judicial—and prosecutorial—effort that his flouting of the processes of the Selective Service System has caused."

[17] While the principal fact-issue calling for the "discretion and expertise" of the local and appeal boards in appraising the validity of conscientious objectors' claims concerns the question of the registrant's sincerity, there is also the question whether the reg-

to enable the agency "to discover and correct its own errors"—an important objective whether the alleged error be one of substance or, as petitioner contends in the instant case,[18] one of procedure—and more fundamentally, to assure that, in so doing, the agency is provided with sufficient opportunity to make the factual findings, exercise the discretion and apply the expertise which, in the first instance, "Congress properly placed with the local and appeal boards of our Selective Service System." *Lockhart* v. *United States*, 420 F. 2d 1143, 1146 (C.A. 9). Petitioner is in the untenable position of asking the courts to substitute themselves for the com-

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istrant's stated beliefs qualify for the statutory exemption—that is, whether his objection is "religious," in the broadest sense of the word (*Welsh* v. *United States*, 398 U.S. 333), or "rests solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 340–41); or whether his objection is to participation in war in any form, as distinguished from participation in a particular war, or a particular sphere of combat in a particular war (see our brief in *Gillette* v. *United States* and *Negre* v. *United States*, Nos. 85 and 325, this Term). Such determinations turn, in the first instance, on questions of fact to which both the local and appeal boards can bring a special expertise (see, *e.g.*, Local Board Memorandum No. 107: *Criteria for Classification of Conscientious Objectors*, issued by the National Director on July 6, 1970); they do not involve purely questions of law or statutory interpretation, as *United States* v. *Eades*, 430 F. 2d 1300 (C.A. 4), and *United States* v. *Davila*, 429 F. 2d 481 (C.A. 5), seem to suggest.

[18] Petitioner argues, as did the dissent below, that the local board's action was void because it never passed on the merits of

petent administrative agency with respect to essential aspects of his claim (see pp. 15–18 *supra*).

If registrants seeking exemption as conscientious objectors are permitted thus to bypass with impunity the established administrative machinery for factfinding and review, there exists a real possibility that the effectiveness of the System will be weakened. For, as this case unquestionably demonstrates, it will enable such registrants to bring before the courts, in the context of criminal prosecutions, *prima facie* claims to exempt status without ever

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his conscientious objector claim. The contention is not (A. 66 n. 1) that the board wilfully refused to consider the claim on receipt of McGee's letter to the President (cf. *Oestereich* v. *Selective Service Board*, *supra*; *Breen* v. *Selective Service Board*, 396 U.S. 460); rather it is that, due to an inadvertent oversight (A. 75), the board based its 1967 denial of the claim on a previous determination in March 1966 that McGee, only because he then held a "lower" II-S classification (see 32 C.F.R. 1623.2), was not entitled to conscientious objector status (A. 35). Even if this were the case (but see *supra*, n. 16), such an inadvertent failure is, as the majority noted below (A. 75–76) precisely the kind of procedural error that a personal appearance before the board—at which the registrant is entitled, among other things, to point out the class in which he thinks he should have been placed and "direct attention to any information in his file which he believes the local board has overlooked" (32 C.F.R. 1624.2(b))—is designed to reveal and remedy. Moreover, though the error is not one which appears on the face of the record before the appeal board, it is true that "communication between the appeal board and the local board," as the majority pointed out (A. 75 n. 10), "could well have developed the true facts."

having them meaningfully examined by the administrative agency from the point of view of the registrant's sincerity. Since the court is in no position to pass upon sincerity (*Witmer* v. *United States, supra*) and the board has evidently not done so, a carefully drawn SSS Form 150 would in this situation virtually assure acquittal on the ground that the record shows "no basis in fact" for denial of a conscientious objector exemption. We cannot ignore the fact that draft counseling has recently become a most sophisticated business. See, *e.g., From 1–A to 4–F And All Points In Between,* New York Times Magazine, p. 34, November 29, 1970. Thus, it is not unlikely that those having access to "expert" assistance in the drafting of their conscientious objector claims will be encouraged, if permitted by this Court to do so, to avoid the administrative remedies, which would necessarily subject the sincerity of their professed beliefs to scrutiny, and take a chance on asserting the defense of misclassification in criminal prosecutions, with resulting delay. The consequent disruption such delaying tactics would have on the System is manifest.[19]

For sound pragmatic and policy reasons, then, the exhaustion doctrine should apply here to preclude petitioner from raising the invalidity of his I–A classification as a defense to his criminal prosecution. While such a result may seem harsh in light of the *prima*

[19] Not to be overlooked is the fact that the delay occasioned by such tactics, which may well be considerable, weighs most heavily on those registrants not contesting their I–A classification who are called up sooner than they should be to fill the vacancies in the board quotas.

facie validity of his claim to conscientious objector status, that is necessarily the case whenever the exhaustion of remedies doctrine is determinative. As Judge Friendly's majority opinion below aptly stated (A. 76):

> * * * [T]he fact that McGee had a good factual case for appeal in no way points against insistence on his taking one; a case of statutory construction like *McKart* differs since on such a matter there is a positive advantage in resort to the courts which alone can decide the issue authoritatively and uniformly for the benefit of all registrants. Instead McGee's stiff-necked refusal to have any dealings with the Selective Service System has caused the expenditure of countless hours by prosecutors, grand and petit jurors, and judges of the trial and appellate courts. If we were free to look at his case alone, we might still be tempted to take the charitable view of our dissenting brother. But if we should do that in McGee's case, we would be obliged to do it in every other similar one. Of course it seems "harsh" when the exhaustion requirement results in a conviction for refusal to submit to induction by a registrant with a seemingly good claim for exemption. But one of the main points of the exhaustion doctrine is to relieve the courts from having to consider claims that ought to be dealt with in the first instance by administrative agencies; it cannot properly be limited to those persons whose claims would fail in court anyway.[20]

[20] Petitioner argues that the requirement that administrative remedies be exhausted applies properly only where the effect is to delay judicial review, not where, as here, the effect is to deny

B. PETITIONER DID NOT QUALIFY HIMSELF FOR EXEMPTION AS A MINISTERIAL STUDENT

1. Petitioner also contends that he was erroneously denied a IV–D (ministerial student) exemption (Pet. Br. 45–52), based on the fact that on September 27, 1967, a week after he was reclassified I–A and about three-and-a-half months before he was ordered to report for induction, he matriculated at Union Theological Seminary, a non-denominational divinity school (*supra*, p. 9).[21] But petitioner never requested a IV–D classification and never informed his local board that he was attending this school. Even assuming that attendance at the school would have sufficed, without more, to establish entitlement to a IV–D exemption—we point out below that it would not—he cannot complain of the board's failure to grant him an exemption

judicial review. To be sure, the applicable considerations are different where a future opportunity to pursue the administrative remedies remains, and exhaustion may more freely be required in that situation. But, for the reasons discussed in *McKart* and in this brief, it is plain that a deliberate flouting of administrative processes need not be excused simply because the individual has wilfully allowed matters to come to such a pass that those processes are no longer available. It might be that the present situation should be conceptualized in terms of waiver rather than "exhaustion" in the sense in which it is used in other administrative law contexts. It is, of course, a common concept in the criminal law that a defendant may forfeit important rights, both procedural and substantive, by knowing waiver. This Court recognized long ago, in *Yakus* v. *United States*, 321 U.S. 414, 444, that "* * * no * * * provision of the Constitution * * * precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity * * *."

[21] Petitioner was still attending the school, as a second-year student, at the time of trial, in November 1968 (Tr. 86–87, 97).

based on facts that he chose not to give the board. Since the local board "has the responsibility of classifying registrants," obviously it must "be given the information necessary to perform its function." See *McKart v. United States, supra*, 395 U.S. at 198 n. 15.[22] With respect to his IV–D claim, petitioner failed not only to exhaust his administrative remedies, but even to invoke the administrative processes in the first instance.

Nor is there substance to the suggestion that the board should have known, without being informed by him, that petitioner was a student at the school, or that the board at least had enough information to impose on it a burden to discover that fact through inquiry (Pet. Br. 47–51). None of the incidents cited in support of the contention (Pet. Br. 47) is germane. Certainly the fact that petitioner informed President Johnson (in his April 1967 letter transmitting his mutilated draft cards) that he had been "accepted for" graduate study in a program that "would probably" qualify him for the theological deferment

[22] The dissent did not disagree with the majority on this issue, observing that the registrant's lack of standing to challenge his classification in the courts is clear when he has "ignore[d] the local board altogether and give[n] it no facts at all" (A. 85). See also 32 C.F.R. 1622.1(c) (each registrant to be considered available for military service until his eligibility for deferment or exemption "is clearly established to the satisfaction of the local board"). And see *Dickinson* v. *United States*, 346 U.S. 389, 395: "[S]ince the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption." Petitioner expressly acknowledged at the trial his awareness that to be entitled to an exemption one must claim it (A. 38).

(*supra*, pp. 6–7) is not pertinent.[23] Aside from its patent vagueness, the statement antedated petitioner's matriculation by five months. A registrant's representation concerning an anticipated future status plainly cannot be regarded—should the expectation be realized—as after-the-fact notice of the event.[24] Even less relevant is the fact that in May 1967, four months before his enrollment, petitioner told two F.B.I. agents, neither of whom had any connection with the board, that he planned to attend the school (A. 24–25), or that a third agent, at about the same time, asked a board clerk whether petitioner's classification would be affected *if* he did so (A. 20–21). Petitioner's reliance on the fact that after his matriculation he advised an Assistant United States Attorney, at a November 1967 grand jury inquiry concerning the burning by

[23] At noted *supra*, p. 7, the local board received a copy of the letter, through official channels, soon after its transmittal.

[24] Local board chairman Lande observed with reference to this statement that a registrant's classification must be based on his current status, not on "something * * * [he] says will happen in the future" (A. 37). Even if it were thought that the board's receipt of the statement shifted the burden to it to inquire further, that duty was in any event discharged. The Current Information Questionnaire (SSS Form 127) which the board sent to petitioner in July 1967, and which petitioner specifically refused to fill out, inquired whether he was to be a student the next semester and, if so, at what school. Petitioner was further instructed in the Form that he might attach any additional information he believed should be brought to the board's attention (*supra*, p. 7). Petitioner's suggestion that the board, upon receipt of his refusal to respond to this questionnaire, should have "solicited the information directly from the school" (Pet. Br. 48, n. 15) not only would push beyond reason the board's hypothesized duty of inquiry, it also overlooks the fact that petitioner had not told the President what school had accepted him for graduate theological study.

petitioner of his draft cards, that he was then attending the school (A. 39) is likewise misplaced. That information, given to a government prosecutor in the course of a criminal inquiry to which it was irrelevant, was not by any reasonable standard imputable to the local board. Petitioner does not suggest that the prosecutor reported the information to the board—or indeed that he had any reason to add such action to his regular duties.

2. Moreover, even if petitioner had properly requested a IV–D exemption, and had informed the local board of the facts on which he relied at trial, he would not have been entitled to the classification. To be entitled to a ministerial student exemption, a registrant must be satisfactorily pursuing a full-time course of instruction in a recognized divinity school *and* be "preparing for the ministry under the direction of" a recognized church or religious organization (50 U.S.C. App. 456(g); 32 C.F.R. 1622.43(a)(3)). Even at the trial, where petitioner first claimed this exemption and evidence on the issue was liberally received, there was no proof that the latter requirement was met. There was some evidence—his own statement—that petitioner, a Catholic, intended some day to become a priest (A. 39). But there was no evidence that at Union Theological Seminary—a nondenominational school—he was preparing for the ministry under the direction of the Catholic Church—or of any other religious group. His parish priest testified that he had recommended petitioner to Union (Tr. 93–94), but that could have meant, as the court below observed (A. 69), no more than that he thought

petitioner a serious and decent young man. The evidence showed that there were Catholic students other than petitioner at Union, some of whom had manifested an intention of becoming priests. Most of those students, however, were enrolled at Catholic seminaries and were merely taking additional special courses at Union (A. 22–23). If those students qualified for the IV–D exemption, it was because they were seminarians, as petitioner was not. While petitioner had at one time been enrolled in a Catholic seminary, preparing for the ministry under the direction of his Church, he had left that seminary five years previously and had in the interim spent three years in, and graduated with a Bachelor of Science degree from, a secular university—in addition to engaging in a variety of other secular pursuits (*supra*, pp. 3–4, 7) Accordingly, petitioner has not to this day established facts requiring a IV–D exemption.[25]

[25] The trial judge found as a fact that petitioner then was, and when he refused induction had been, pursuing a full-time course of instruction in a recognized divinity school, Union Theological Seminary, but that the school "was [not] under the direction of a recognized church or religious organization, but rather * * * was * * * a non-denominational seminary" (A. 41–42). The court of appeals noted that if the judge thereby meant that the divinity school itself has to be under the direction of a recognized church or religious organization in order for its students to qualify for IV–D exemption he would have misinterpreted the statute (50 U.S.C. App. 456(g))—since under the statute it is the student's studies, not the school, that must be under the direction of a recognized religious group (A. 70, n. 5). The court, however, did not so interpret the judge's finding. It believed that all the judge meant was that, since Union Theological Seminary was non-denominational, the nature of the school could not of itself supply the necessary element of "direction"—as might be the case, for example, if the

II. PETITIONER'S CONVICTIONS ON THE OTHER COUNTS NEED NOT BE CONSIDERED IF THE CONVICTION FOR FAILURE TO SUBMIT IS AFFIRMED; IN ANY EVENT THEY WERE PROPER

A. AFFIRMANCE OF COUNT I OBVIATES CONSIDERATION OF THE OTHER COUNTS

Petitioner's challenges to his convictions on Counts II (failure to report for his pre-induction physical examination) and III (failure to keep in his possession his I–A Notice of Classification) both presuppose the invalidity of the I–A classification upon which the Count I conviction rests (Pet. Br. 52–56). The majority of the court below accordingly found it unnecessary to consider these two counts, and this Court presumably would as well if it accepts our arguments in the preceding section of this brief.

The majority below further found it unnecessary, under the concurrent sentence doctrine (see *Hira-*

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seminary were denominational. So read, of course, the finding involved no misconstruction of the statute. While we agree with the court of appeals' analysis, we also note that even if the judge in fact misinterpreted Section 456(g), the error was harmless. We have argued, above, that a registrant who has never requested a particular exempt status, or supplied his board with information pertinent to such a request, may not be heard to contend, in a prosecution for violating a board order, that the board erred in not granting the exemption. If this seemingly indisputable proposition is sound, the judge should not have permitted petitioner to attempt to show at the trial that he in fact qualified for the ministerial student exemption, and should have excluded the evidence tendered on the issue. Had he done so, he would of course have had no occasion to consider Section 456(g). It was, in short, only in consequence of an error in petitioner's favor as to the scope of the trial issues that the possible error of construction occurred.

bayashi v. *United States*, 320 U.S. 81, 85), to consider the conviction under Count IV (refusal to furnish the local board with the information requested in the Current Information Questionnaire sent petitioner in July 1967 following completion of his undergraduate education). This was permissible, as a matter of discretionary judicial convenience, under *Benton* v. *Maryland*, 395 U.S. 784, 791; see, *e.g.*, *United States* v. *Barsaloux*, 419 F.2d 1299, 1300 (C.A. 5), certiorari denied, 397 U.S. 972. The same exercise of discretion by this Court would be appropriate if the basic conviction for failure to submit to induction is affirmed. Since that offense is plainly the most serious of those charged, it is reasonable to infer that it was the basis for the two-year sentence, rather than the offense charged in Count IV (and those of Counts II and III). This would seem to be a rather clear case for a judicial determination not to review a conviction absorbed in a concurrent sentence.

B. EVEN IF COUNT I WERE REVERSED, THE OTHER COUNTS SHOULD STAND, WITH RECONSIDERATION OF THE SENTENCE

If, contrary to the arguments we have made, this Court were to reverse petitioner's basic conviction for failure to submit, it would be appropriate to remand the incidental counts for consideration by the court of appeals; the questions raised with respect to these counts are not of such import as to require this Court's immediate consideration. We submit, however, our reasons for believing that petitioner was properly punishable, under 50 U.S.C. App. 462(a), for these instances of deliberate nonperformance of duties reason-

ably imposed upon him under the Selective Service laws and regulations.

1. Even if his classification is invalid, a registrant is not ipso facto relieved of his obligation to obey an order to report for a physical examination

Petitioner argues that the Count II conviction should be set aside because he would not have been subject to any duty to have a physical examination if he had been classified—as he alleges he should have been at the time of the order—as a conscientious objector or as a ministerial student. We agree that petitioner would have had no such obligation if he had been so classified,[26] but it does not follow that this

[26] An order to report for physical examination (SSS Form 223) is sent not only to registrants eligible for military service (Classes I-A and I-A-O), but also to those in Class I-O (32 C.F.R. 1628.10, 1628.11(b)). But whereas I-A and I-A-O registrants are required, subject to the criminal sanctions of the Act, to comply with their orders, this is not true of I-O registrants. The order sent to the I-O registrant is solely for his own protection—its purpose being to ensure that he will not be required to perform the civilian service which the Act requires of him in lieu of induction unless he meets the Army's standards of physical fitness. For this reason the I-O registrant can choose to forego the prescribed Armed Forces physical examination—in which event he may be ordered to perform the required civilian service "in the same manner as if [he] had taken the examination and had been found qualified for military service" (SSS Form 223). See also 32 C.F.R. 1660.20(a) (I-O registrant to submit to his local board proposed types of civilian work after he has been found qualified for military service at his Armed Forces examination *or* he has "failed to report for or submit to" such examination). And see *United States* v. *Mendoza*, 295 F. Supp. 673, 683 (E.D. N.Y.); *United States* v. *Walsh*, 279 F. Supp. 115, 118–119 (D. Mass). Cf. *Shoemaker* v. *United States*, 413 F. 2d 274, 275 (C.A. 9), certiorari denied, 396 U.S. 837.

form of self-help was justified even if an exempt classification was improperly denied. As this Court observed in *McKart* v. *United States, supra,* 395 U.S. at 203, "[a]n invalid classification * * * would not be a defense today to a prosecution for failure to report for a pre-induction physical examination."

To be sure, a registrant can resist an order to report for induction with impunity if that order turns out to be invalid; that is, indeed, the normal way to assert judicially his right to avoid military service not owed, after the selective service process has been completed. But that does not mean that his belief that his classification is improper permits him to ignore the board's intermediate directives, which subject him to no such grave consequences;[27] petitioner cannot claim that a physical examination would have harmed him or even substantially inconvenienced him, but allowing registrants to ignore such orders would plainly disrupt the reasonably efficient functioning of the system, in which there is a strong public interest.[28] See,

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[27] But cf. *United States* v. *Brandt*, C.A. 9, No. 25,486, decided December 4, 1970, where the court set aside a conviction for failure to report for a physical examination because the underlying I–A classification was invalid as a matter of law, under the authority of *Gutknecht* v. *United States*, 396 U.S. 295. Here the challenge to the I–A classification turns on a question of disputed fact and not a question of law.

[28] Cf. 32 C.F.R. 1628.11(b) (registrant may be required to undergo preinduction physical examination "without regard to whether an appeal has been or will be taken"). And see *United States V. Hertlein*, 143 F. Supp. 742, 744 (E.D. Wis.) (defendant had duty to take his physical examination as ordered "whether or not an appeal was pending"). Under the cited regulation, a registrant who ignored an order to report for a physical examination while appealing his I–A classification could

e.g., United States v. *Nugent,* 346 U.S. 1, 9; *Falbo* v. *United States,* 320 U.S. 549, 553.

2. Similarly, an improper classification would not eliminate the obligation to retain possession of the Notice of Classification

Count III charged that petitioner knowingly failed to keep in his possession the I–A Notice of Classification that was mailed to him in September 1967 (A. 5–6). The pertinent regulation (32 C.F.R. 1623.5) requires each registrant who has been classified to have in his possession at all times "a valid Notice of Classification (SSS Form 110)" showing his current classification. Petitioner argues that because his I–A classification was invalid he had no duty under the regulation to retain the Notice (Pet. Br. 55–56). The dissent below found this argument "particularly" unpersuasive (A. 88), and we agree. There is no suggestion either in the text or the context of the regulation that the qualifier "valid" relates to the correctness of the classification. It is the phrase "Notice of Classification (SSS Form 110)" that is modified; all that is meant is that the certificate be authentic and properly executed, an attribute that petitioner does not contest.[29]

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not be heard to contend, should the appeal be successful, that he committed no offense in disobeying the order. Thus, should his challenge here to his I–A classification be sustained, petitioner would be in no essentially different posture as regards his challenge of the order to submit to a physical examination.

[29] In *United States* v. *Hertlein,* 143 F. Supp. 742, 746–747 (E.D. Wis.), cited by petitioner (Pet. Br. 56), the regulation in issue was held not to apply to a classification notice advising the registrant of a classification which the local board had had no "jurisdiction" to make—because of the pendency of an appeal from a prior classification at the time the board acted.

3. The conviction for refusal to answer a Selective Service questionnaire is valid

Petitioner concedes (Br. 58), with respect to Count IV, that his failure to respond to the Current Information Questionnaire sent him in July 1967 upon the completion of his schooling at the University of Rochester "undoubtedly violated" 32 C.F.R. 1641.7(b); it is not disputed that petitioner received the questionnaire and deliberately refused to fill it out. He argues, however, that the violation was "technical" only, claiming that the information sought was in the board's possession already, or was furnished to the government indirectly before the charges were brought, and would in any event have been beneficial rather than harmful to petitioner's claims; he further contends that the sole sanction for noncompliance with requests for information should be the forfeiture of any claimed exemption or deferment, to the exclusion of criminal liability (Pet. Br. 57–62). These arguments are plainly inconsistent with the categorical language of the regulation, which provides that each registrant "shall submit to his local board in writing all information which the local

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Since the instant case involves no comparable situation, that decision, assuming it to be sound, is distinguishable. There is no question in this case of the local board's authority to act when it took the action which petitioner challenges.

Petitioner's further suggestion that a classification notice showing an "incorrect classification" could serve none of the functions of such a certificate discussed in *United States* v. *O'Brien*, 391 U.S. 367 (Pet. Br. 55–56), is incorrect. Such a certificate—to cite but one example—would certainly be as useful as one whose validity was unquestioned in carrying the "continual reminder" to the registrant that he must notify his local board of any change of address and other specified changes in his status (391 U.S. at 379).

board may at any time request from him * * *" (32 C.F.R. 1641.7(b)). And there is nothing in the Act or regulations which suggests that the criminal penalty for violations of the regulations generally (50 U.S.C. App. 462(a)) does not apply to this regulation. The Selective Service System could not function without such elementary cooperation by registrants; we are not dealing here with a minor lapse, but with flat defiance of a reasonable request for information not readily available to the local board otherwise, and which petitioner never provided to it.[20]

* * * * * * *

While it is our view, for the reasons stated, that the convictions on the three subsidiary counts should be sustained even if the principal conviction is held invalid, it would be appropriate, if the Court should reverse as to Count I, to remand the case to the district court for reconsideration of the sentences on the lesser counts. In giving concurrent two-year sentences on each of the latter counts the trial judge may have

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[20] *United States* v. *Norton*, 179 F. 2d 527 (C.A. 2), relied on by petitioner (Pet. Br. 59-60), does not support his position. That case held merely that it is not an offense for a registrant to refuse to sign his registration card when registering, in light of the specific provision of the regulations that in the event of such refusal the registrar shall sign the registrant's name for him, with the same force and effect as if the registrant had done so (former 32 C.F.R. 613.13(c); now 32 C.F.R. 1613.13(c)). The regulation, in short, "condon[ed] * * * the refusal" (179 F. 2d at 529) But petitioner here did more than refuse to sign his name; he refused to supply requested information. That the distinction is critical was noted, indeed, by *Norton* itself (*ibid.*).

Petitioner's contentions largely take the form of objections to the instructions given to the jury on this count. But petitioner failed to object to the instructions when given (Tr. 245-247, 293-296), and so cannot object here. Rule 30, F. R. Crim. P.

been influenced by the seriousness of the principal conviction. Should the principal conviction be held invalid, therefore, the judge should be given the opportunity to reconsider the sentences imposed on the other counts. Cf. *Yates* v. *United States*, 355 U.S. 66, 356 U.S. 363; *United States* v. *Hines*, 256 F. 2d 561, 563, 564 (C.A. 2); *United States* v. *Barash*, 365 F. 2d 395, 403 (C.A. 2).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed. Should the Court reverse the conviction for refusing to submit to induction, it should remand the case to the court of appeals for consideration of the convictions on the other counts, or in the alternative affirm as to those counts but remand to the district court for reconsideration of the sentences thereunder.

Respectfully submitted.

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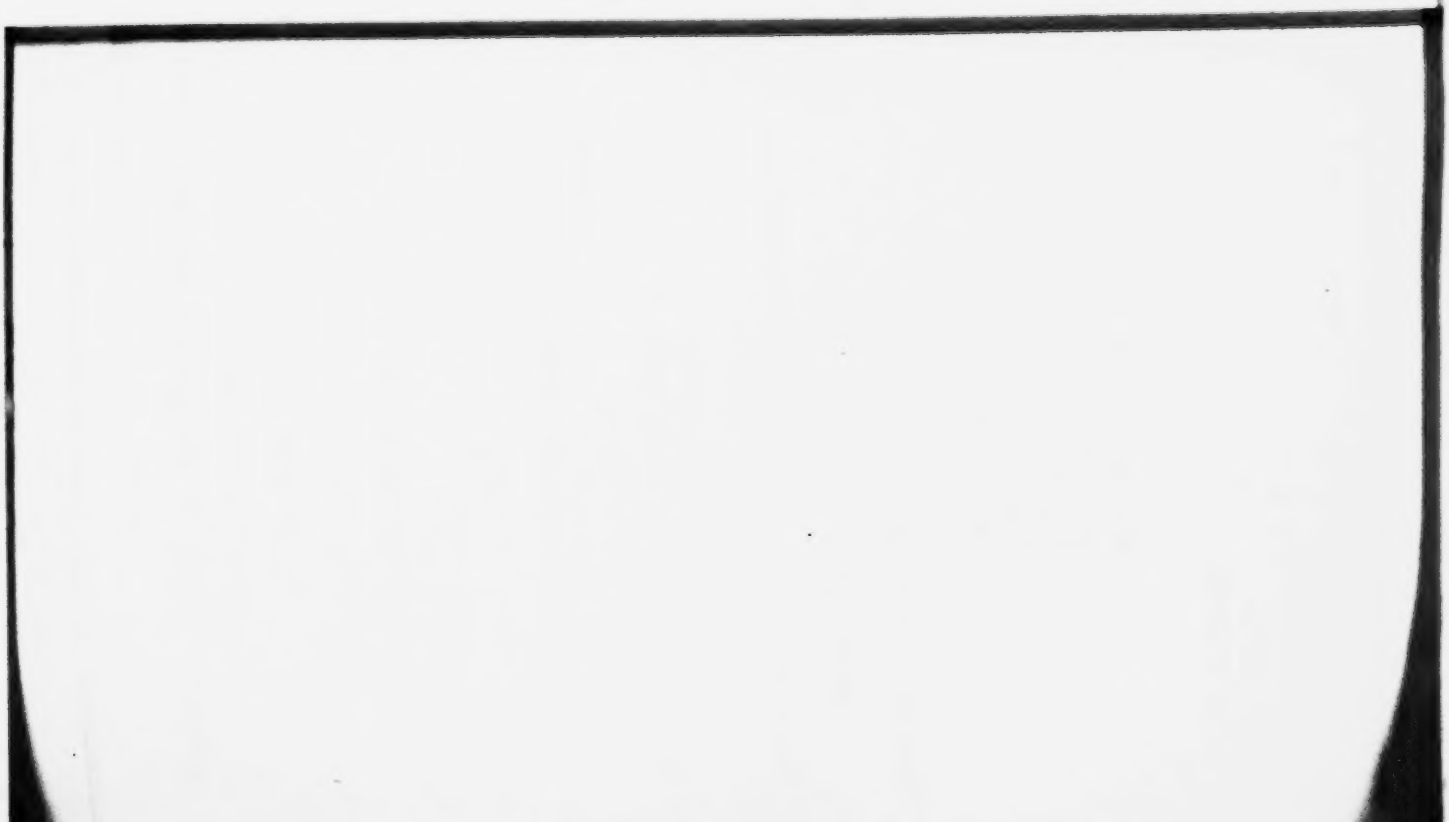

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

I.

A Decision in Petitioner's Favor Would Not Encourage Registrants to Avoid the Administrative System.

Petitioner argued in his Brief (pp. 36-38) that the exhaustion requirement was not justified by any reasonable apprehension that if the requirement were to be relaxed in this case, other registrants would be encouraged to avoid administrative remedies available to them. The government responds by suggesting that a decision for petitioner would in fact seriously interfere with the operations of

the Selective Service System by encouraging registrants, with the "expert" assistance of draft counselors, to submit a "carefully drawn" SSS Form 150, forego a personal appearance and appeals and ". . . take a chance on asserting the defense of misclassification in criminal prosecutions, with resulting delay." (Brief for the United States, p. 30.) That position wholly misconceives petitioner's argument as well as the operation of local boards in conscientious objector cases.

The government's position assumes the ease of drawing a Form 150 which will establish a *prima facie* case, an assumption belied by the number of cases in which registrants have been unable to establish a *prima facie* case. See, e.g., *United States* v. *Brown,* 423 F.2d 751 (3rd Cir. 1970); *Keefer* v. *United States,* 313 F.2d 773 (9th Cir. 1963); *United States* v. *Wallace,* 310 F. Supp. 961 (E.D. Cal. 1970); *United States* v. *Warner,* 284 F. Supp. 366 (D. Ariz. 1968); *United States* v. *Wider,* 119 F. Supp. 676 (E.D.N.Y. 1954). "A prima facie case of the registrant's sincerity is not made merely by a statement of his beliefs without more. . . ." *Salamy* v. *United States,* 379 F.2d 838, 842 (10th Cir. 1967).

The government is led to this error by ignoring the fact that local boards have before them not only "well-drawn" forms, but an applicant's entire file, which may well reflect activities or beliefs during his life which are inconsistent with entitlement to conscientious objector status. As this Court has noted a registrant may fail to make out a *prima facie* case where

> ". . . the claim is plainly incredible, or where, even if true, it would not warrant reclassification, or where the claim has already been passed on, or where the

claim itself is conclusively refuted by other information in the applicant's file. Moreover, a registrant who makes false statements to his draft board is subject to severe criminal penalties. 50 U.S.C., App. §462(a)." *Mulloy* v. *United States,* 398 U.S. 410, 418, n. 7 (1970).

But assuming the registrant avoids these obstacles and in fact presents a *prima facie* case, where then is he? He may of course get the exemption, a result the likelihood of which would be neither increased nor decreased by a decision for petitioner. If he is classified I-A, however, according to the government there would be nothing which a reviewing court could later find as a basis in fact for denying the exemption. But how, then, could the board have classified him I-A? If, as the government apparently suggests, it is because the applicant has not demonstrated his sincerity by a personal appearance, we point out that the registrant up to this stage has no right to appear before the board and it is the regulations themselves which give the right to appear only *after* the classification and not before. 32 C.F.R. 1624.1(a). In any case, if the board feels that the "well-drawn" Form 150 demonstrates that the registrant is insincere in his claim so as to justify a I-A classification, it should—and must—be able to point to some "affirmative evidence," *Dickinson* v. *United States,* 346 U.S. 389, 396 (1953), supporting its position. The board can then record those facts in the registrant's file for a reviewing court to see. But the local board is not permitted to reject a claim simply on the basis of some vague doubts about the registrant's sincerity. As this Court noted in reversing the conviction in *Dickinson, supra*:

"The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickin-

> son's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. . . . Dickinson's claims were not disputed by any evidence presented to the selective service authorities, nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities." *Id.* at 396.

On the other hand, the local board is not powerless when it has vague doubts but no "affirmative evidence" to which it could point. The Selective Service regulations give the board wide powers to obtain that evidence, 32 C.F.R. 1621.14, 1621.15 and 1625.1(c), powers to which this Court referred in *Dickinson*. *Id.* at 396-97. The court below recognized that the board possessed the power to compel petitioner to appear if it doubted his sincerity (A. 71). In fact, New York City boards, such as petitioner's, have available a form (Addendum to this Reply Brief, p. 11) for just those instances where a board needs the registrant's appearance in order to properly classify him.

If the board requires the registrant's appearance before it, and he refuses for reasons not consistent with conscientious objection, the board might well take that to evidence a lack of sincerity and conclude that he has not satisfied the burden of proving his entitlement to the exemption. "In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant. It is 'affirmative evidence . . . that a registrant has not painted a complete or accurate picture. . . .'

Dickinson v. United States, supra, 346 U.S. at 396." *Witmer* v. *United States,* 348 U.S. 375, 381 (1955).

Nothing in our Brief suggests that relaxing the exhaustion doctrine would relieve the registrant of this burden. *Dickinson* v. *United States, supra.* To the contrary, we concede that he must present his claim to the local board (Brief for Petitioner, p. 33, n. 9). If that claim is inadequate to justify conscientious objector status, the board should state its reasons and a reviewing court will have a basis in fact to support the board's action.[1]

The government's confusion here is a result of its continued insistence that petitioner made out only a *prima facie* case (Brief for the United States, pp. 5, n. 3, 26, 27, 29, 30, 31). In reality, all three judges in the court below agreed that the local board had no basis in fact for denying petitioner's conscientious claim (A. 71-72, 79). And the majority did not merely confine its review to his Form 150 as the government implies (Brief, p. 26, n. 16), but considered as well, "his prior [and] his subsequent actions" (A. 71) along with the rest of his file, which is all that petitioner's board customarily had before it in conscientious objector cases. *Ibid.* In short, we do not argue that a registrant need not supply all that information which the board requires in order to grant him his classification, nor do we dispute that the burden of proving that he deserves the classification is on him. If, however, a regis-

[1] The requirement that boards state reasons for their actions is now law in many circuits. See, *e.g., United States* v. *Deere,* 428 F.2d 1119 (2d Cir. 1970); *Scott* v. *Commanding Officer,* 431 F.2d 1132 (3rd Cir. 1970); *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970); *United States ex rel. Brown* v. *Resor,* 429 F.2d 96 (10th Cir. 1970); *United States* v. *Lemmens,* 430 F.2d 619 (7th Cir. 1970).

trant, such as petitioner, meets that burden, he need not appeal from the board's denial of his classification in order to challenge that action in defense to a criminal proceeding.

Having clarified our position, we return to the tactic of delay raised by the government and discussed in the opening paragraph of this Brief. Since we have suggested no less of a burden upon the registrant in proving his case, whether or not he exhausts his remedies, the "expert" draft counselor will offer the same advice as he now does regarding personal appearances. That advice is invariably to appear since that still remains the best opportunity to convince the board of the sincerity of one's claim. CCCO, *Handbook for Conscientious Objectors* 20 (1970); Blackman, *Face to Face With Your Draft Board* 11-12 (1969); SSLR Practice Manual ¶1079 at 1064 (1968).

II.

Petitioner's Failure to Report for a Physical Examination Was Not Unlawful.

Petitioner in his Brief (pp. 52-54) argued that his failure to report as ordered for a pre-induction physical examination would have been excused had he been properly classified. The government takes issue with this argument by relying on the dictum in *McKart* v. *United States,* 395 U.S. 185, 203 (1969), that "[a]n invalid classification . . . would not be a defense today to a prosecution for failing to report for a pre-induction examination." The inapplicability of this language to the instant case was demonstrated by Judge Feinberg in his dissent below.

"... *McKart* did not deal with the wrongful denial of a I-O classification, and thus did not consider the option to waive a physical examination which is afforded to registrants holding such a classification. McGee should not be penalized because of the board's error, or deprived of the benefit of selective service procedures designed for conscientious objectors. Therefore, McGee's conviction on Count 2 should also be set aside" (A. 87-88).

Judge Feinberg's reasoning was anticipated by the court in *United States* v. *Walsh*, 279 F. Supp. 115 (D. Mass. 1968), where the defendant was prosecuted for failure to submit to induction and for failure to report for a pre-induction physical examination. In granting the defendant's motion for acquittal on the physical examination count, the court stated:

> "Had the board classified him I-O, defendant's delinquency status would have been rendered moot, since I-O registrants who fail to report for physical examinations when ordered are not classified as delinquents .... Because this possibility was denied defendant by reason of the board's arbitrary action, his motion for judgment of acquittal is granted as to Count I as well." 279 F. Supp. at 121.

This position has been adopted by the Ninth Circuit in *United States* v. *Brandt*, No. 25,486 (9th Cir., Dec. 4, 1970). There the court reversed the defendant's conviction for failure to report for a physical examination on the ground that the underlying I-A classification, as petitioner argues here, was invalid. The government's attempt to

distinguish *Brandt* (Brief for the United States, p. 40, n. 27) as a case involving a question of law, while maintaining that the issue here is one of fact, is without merit. Petitioner's local board, in denying his conscientious objector application without a basis in fact (A. 71-72, 79), acted outside of its jurisdiction just as did the local board in *Brandt*. *Estep* v. *United States*, 327 U.S. 114, 122 (1946).

The government argues that ". . . allowing registrants to ignore such orders [for example, to report for a physical examination] would plainly disrupt the reasonably efficient functioning of the system, in which there is a strong public interest." (Brief for the United States, p. 40.)

However, the Selective Service regulations make provision for the smooth functioning of the system when a registrant fails to report for a pre-induction physical examination. Such a registrant may be declared a delinquent, 32 C.F.R. 1642.4(a), and ". . . may be ordered to report for induction without being given an armed forces physical examination." 32 C.F.R. 1628.10.

The petitioner here admittedly failed to report as ordered for his pre-induction physical examination. His local board then proceeded to classify him I-A delinquent (A. 58, 64). But the government's argument that refusal to report for a pre-induction physical ". . . would plainly disrupt the efficient functioning of the system . . ." ignores the fact that petitioner, in accordance with Selective Service procedure, was ordered to report for induction without having first undergone a pre-induction physical examination.

Moreover, the petitioner's failure to report for the pre-induction physical examination did not prejudice the Selective Service System since he took and passed a complete physical examination the day he refused induction. That

Selective Service was not prejudiced by petitioner's failure is demonstrated by its decision not to prosecute petitioner immediately after he failed to report for the physical examination.[2]

Instead, petitioner's local board proceeded in accordance with Local Board Memorandum No. 14, para. 3(c), by declaring him delinquent. Apparently, Selective Service believed this procedure to thoroughly vindicate its interests here since the Director of New York Selective Service recommended prosecution only for refusal of induction and nonpossession of a draft card (Govt. Ex. 39, A. 58-59).[3]

The position of Selective Service is understandable in view of the fact that, pursuant to AR 601-270, para. 32a, petitioner received a complete physical examination when he appeared at the induction station on the day scheduled for induction. As a result, the induction station personnel had all the information they needed to determine his acceptability—and all the information which they would have obtained had petitioner taken the pre-induction physical (Govt. Ex. 37).

If, under these circumstances, Selective Service, charged with administering the Act, believes that a registrant has substantially performed the duties required of him, we submit that petitioner has committed no crime.

---

[2] It is noteworthy that the defendant in *McKart* also was ordered to report for a pre-induction physical, but failed to do so, and was declared a delinquent. 395 U.S. at 188. McKart then failed to report for and submit to induction and was subsequently prosecuted for this alleged violation of the Act, but he was not prosecuted for his failure to report for the pre-induction physical examination.

[3] This recommendation was made in accordance with the policy of the Selective Service System. See Brief for Petitioner, p. 49, n. 17.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, the Court should reverse the judgment below and enter a judgment of acquittal on all four counts of the indictment.

Respectfully submitted,

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MARVIN M. KARPATKIN
MELVIN L. WULF
Of Counsel

ADDENDUM

ADDENDUM

DATE:

SS No.

Dear Mr.

An appointment has been scheduled for you to appear at this Local Board office on 19 at P.M. for the reason checked below:

☐ Your request for a personal appearance. If you have any new evidence pertinent to your case, please put it in writing and send it to the Local Board prior to the date of your appearance or bring it with you. This will give the board time to consider this new evidence so that they may discuss it with you at the time of your appearance and that the evidence may be included in your file.

☐ You are to appear for a permissive interview. Any evidence you wish the Local Board to consider is to be submitted in writing prior to or on the date of your interview, and will be included in your file.

☐ You are to see the Government Appeal Agent as you requested, so that he may assist you in your appeal or advise you concerning present Selective Service Laws, Regulations and directives. Any evidence submitted should be in writing.

The Local Board may impose a limitation on the time you may have for your appearance. You should plan your presentation beforehand, making it as brief and concise as possible. The Local Board may permit any other person to appear before it with you, or on your behalf; however, they may not permit you to be represented by an attorney or legal counsel.

.....

SSS-NYC
Form No. 44
(Revised Aug 4, '70)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF AMICUS CURIAE

I. PETITIONER'S RIGHT TO JUDICIAL REVIEW OF HIS DRAFT CLASSIFICATION IS ESTABLISHED BY THE JUDICIAL REVIEW PROVISION OF THE MILITARY SELECTIVE SERVICE ACT OF 1967.

The case at bar arose upon McGee's refusal to submit to induction on January 29, 1968. The case is therefore governed by the Military Selective Service Act of 1967. [50 U.S.C.App. §§451 et seq.]

That act contains the following new provision not found in any previous Selective Service law:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.
>
> [50 U.S.C. App. §460(b)(3).][1]

The Solicitor General does not deny that petitioner sought judicial review of his classification (a) "in defense to a criminal prosecution, instituted under section 12 of this title" and (b) after he "responded . . . negatively to an order to report for induction." Having met the prescribed conditions, petitioner was thus entitled to judicial review of his classification, by statute.

The Solicitor General apparently concedes, *sub silentio,* that the statute in question affirmatively provides for judicial review of the classification in the case at bar, for he makes no contention to the contrary.

---

[1]This provision embodies the rule of *Falbo v. United States,* 320 U.S. 549 (1944) that judicial review of draft board action is to be deferred until the end of the selection process, "after the registrant has responded . . . negatively to an order to report for induction". The *Falbo* decision is analyzed in Appendix A hereto.

In essence, then, the Solicitor General argues that, in cases where the draft classification has not been appealed, a Federal Court should decline to exercise the jurisdiction which it has by statute. This argument conflicts with the fundamental obligation of the Federal Courts recognized since the time of Chief Justice John Marshall, to exercise jurisdiction which is given. *Cohens v. Virginia,* 6 Wheat. (5 U.S.) 264, 404 (1821):

> It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909):

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."

Meredith v. City of Winter Haven, 320 U.S. 228 (1943); *Propper v. Clark,* 337 U.S. 472, 492 (1949); *Allegheny County v. Frank Mashuda,* 360 U.S. 185, 188-189. *Mach-tronics, Incorporated v. Zirpoli,* 316 F.2d 820, 824 (9th Cir. 1963):

> It has long been recognized that when a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.

Moreover, even if it could be somehow shown why the Federal Courts should decline to exercise their

statutory jurisdiction to review Selective Service orders in cases like the one at bar, should not the same considerations induce judicial declination to exercise their jurisdiction to enforce such orders? If the administrative process be deemed abortive for purposes of review, it should be likewise deemed abortive for purposes of enforcement, especially since the State Director has power at any time to appeal any classification [32 C.F.R. 1626.1,[2] 1655.20] and conducts routine pre-indictment review of all conscientious objector cases [Local Board Memorandum No. 14, section 9]. The State Director should not be permitted to invoke the jurisdiction of a Federal Court under 50 U.S.C. App. §460(b)(3) to enforce an administrative order while at the same time urging the court to abdicate an essential element of that jurisdiction, viz., judicial review of the order sought to be enforced. To the extent he is successful in invoking such one-way jurisdiction, the courts will become a rubber stamp for any agency action, however illegal. [Section II, *infra.*]

Most of the cases relied on by the Solicitor General are not in point because they arose under prior stat-

[2]The continuing existence of this option refutes the contention of the Solicitor General that McGee deprived Selective Service of the opportunity to appeal. In fact, the Solicitor General has failed to show any prejudice whatever suffered by the Government. The "expenditure of countless hours by prosecutors, grand and petit jurors, and judges" must be laid to the local board which classified McGee without any factual basis and unlawfully ordered him inducted. It cannot be charged to McGee. The nearest the Solicitor General can come to showing prejudice is to speculate that if McGee had appealed he might have been exempted from military service. Thus, the argument boils down to this: "We acted illegally when we ordered McGee inducted, but he must be punished anyway because we might not have done so."

utes which contained no provision whatever for judicial review. This includes *McKart v. United States*, 395 U.S. 185 (1969), and all the Court of Appeals decisions cited in Respondent's Brief at page 19, note 9. In those cases the courts were faced with the problem of determining the availability and timing of judicial review in the absence of any express statutory provision for such review. They are not relevant to the case at bar because the 1967 Act specifically authorizes precisely the judicial review sought by petitioner.[3]

The only case cited by the Solicitor General involving the availability of post-induction order judicial review under the 1967 Act is *Lockhart v. United States*, 420 F.2d 1143 (9th Cir. 1969). In that case it was held that Lockhart was barred from presenting a basis in fact defense to a criminal prosecution under the 1967 Act because he had not appealed his classification. The majority opinion does not cite, discuss or analyze the judicial review provision of the 1967 Act.[4] It simply follows principles laid down under prior statutes which did not provide for judicial review at all. The decision is clearly erroneous. It denies due process by forfeiting a criminal defense without notice. It invades the legislative arena by, in effect, making failure to appeal a criminal offense. It

[3]The Solicitor General asserts that petitioner is "asking the courts to substitute themselves for the . . . administrative agency . . . " [Resp.Br. pp. 28-29.] Not so. Petitioner only seeks a judicial determination whether there is any basis in fact for his classification, an issue precisely within the scope of review prescribed by Congress.

[4]Only Judge Browning's dissent (concurred in by Judge Hamley) examines the governing statutory provision.

violates the duty of the judiciary to exercise jurisdiction which it has by law. It places an agency of the executive branch above the law by removing the only effective check on its lawless acts. Worst of all, it sends to prison an innocent man without giving him his day in court.

II. THE POSITION URGED BY THE SOLICITOR GENERAL WOULD CREATE AN IMBALANCE OF POWERS AMONG THE THREE BRANCHES OF GOVERNMENT, PLACING AN AGENCY OF THE EXECUTIVE BRANCH ABOVE THE LAW.

The decision below involves a judicial entry into the sphere of the legislative branch of government. The court below reviewed McGee's classification, concluding that McGee had established his right to exemption from military service, and that the local board had no basis in fact for classifying him I-A. [Petition for Certiorari, pp. 11a-12a.] It follows that the induction order was illegal. *Estep v. United States,* 327 U.S. 114 (1946). Thus, the imposition of criminal punishment pursuant to count one rests in actuality not on violation of 50 U.S.C. App. section 462(a) (which was not proved),[5] but on McGee's

[5]Since the Government's own evidence (the Selective Service file) showed that the induction order had no basis in fact, there was a failure of proof of the alleged refusal to submit to induction. Irrespective of a waiver of the right to defend, a District Court must always, absent a plea of guilty, insist on proof of the crime charged, beyond a reasonable doubt. In cases where an exemption claim has been rejected by the local board, this must include proof of a basis in fact to support the action of the board. This necessarily follows from the rule that a basis in fact is an indispensable element of local board jurisdiction. *Estep, supra,* at 122-23.

failure to take an adminstrative appeal from his I-A classification. The Solicitor General concedes that there is no statute which requires a draft registrant to appeal. [Resp. Br. p. 21, n. 11] Nor is there any regulation which requires a draft registrant to appeal.

In this analysis the imposition of criminal punishment by the court below, pursuant to count one, involves the creation by the judiciary of a new crime, i.e., failure to take an administrative appeal from a draft classification. This violates the fundamental policy of our jurisprudence that it is for the Congress to prescribe what conduct shall be prohibited or compelled on pain of criminal punishment. "Crimes against the United States must be made so by Congressional Act."[6] *United States v. Hudson and Goodwin,* 7 Cranch (11 U.S.) 32 (1813); *United States v. Coolidge,* 1 Wheat. (14 U.S.) 415 (1816); *United States v. Eaton,* 144 U.S. 677, 688 (1892): "It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense."[7]

A much more serious imbalance of powers is also involved in the position urged by the Solicitor Gen-

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[6]Jackson, *The Supreme Court in the American System of Government,* Harper Ed. (1963) p. 31.

[7]The imposition of criminal punishment for conduct not proscribed by a statute "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties * * * violates the first essential of due process of law." *Connally v. General Const. Co.,* 269 U.S. 385 (1926). Cf. *United States v. Five Gambling Services,* 346 U.S. 441, 452-453 (1953).

eral. He contends that this Court should enforce an administrative order even though it is devoid of evidentiary support.

A similar contention was made by the Attorney General many years ago. *Interstate Commerce Commission v. Louisville and Nashville Railroad Company,* 227 U.S. 88 (1913). There the argument was made that an order of the Interstate Commerce Commission, setting aside railroad rates which it deemed unreasonable, was conclusive on the courts even if the finding was wholly without substantial evidence to support it.[8] This Court replied as follows:

> A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> [227 U.S. at 91.]

When a Federal Court lends its power and prestige to the enforcement of an unlawful administrative

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[8]Justice Jackson considered this to be "[P]erhaps the most extreme argument" made for administrative autonomy. *Op. cit. supra,* n. 6, at 48.

order, as the court below did, it sanctions unchecked action by an agency of the executive branch of government, and abdicates the most sacred obligation of the judiciary: to stand as a bulwark against unwarranted or oppressive treatment by the executive branch of any citizen, however lowly.

III. THE SOLICITOR GENERAL IMPLICITLY CONCEDES THAT THE DECISION BELOW DENIES DUE PROCESS.

The Solicitor General states that when McGee was classified he was notified "that he had a right to . . . take an appeal within 30 days". [Resp.Br. p. 8] Conspicuously, he omits any assertion that Selective Service ever informed McGee that unless he took an appeal he might forfeit his right to defend against subsequent criminal charges. The absence of such notice is fatal. Due process requires notice and hearing; necessarily it requires notice before forfeiture of the right to defend a criminal case, since such a deprivation includes forfeiture of all the rights guaranteed by the Sixth Amendment. That is why such forfeiture must necessarily be grounded on waiver principles.

The Solicitor General states that "It might be that the present situation should be conceptualized in terms of waiver rather than 'exhaustion' . . ." [Resp. Br. p. 32, n. 20]. Since he does not point to any evidence or any finding in the case at bar that peti-

tioner waived his right to defend, that concession is apparently conclusive.[9]

IV. THE PURPOSE OF THE EXHAUSTION RULE CAN BE ACCOMPLISHED BY APPROPRIATE INTERLOCUTORY ORDERS IN THE TRIAL COURT.

The purposes of the exhaustion rule urged by the Solicitor General can be accomplished, consistent with constitutional traditions and fairness of procedure, by appropriate interlocutory orders in the trial courts.

When a draft prosecution is initiated the District Court can ascertain at an appropriate pre-trial stage (a) whether there will be a defense of misclassification, and (b) whether an administrative appeal has been taken. If the District Court finds that there will be such defense and that there has been no administrative appeal, it can order the prosecution held in abeyance pending a review of the Selective Service file by the State Director.[10] The United States Attorney can be informed that if he declines to take advantage of that review he will be held to have waived

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[9]The reference to *Yakus v. United States*, 321 U.S. 414 (Resp. Br. p. 32, fn. 20) is inapposite because the legislation here involved does not purport to make "criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." Other distinctions between *Yakus* and this case are discussed in Appendix B hereto.

[10]This would amount to asserting jurisdiction but deferring its full exercise pending exhaustion of administrative remedies which may be available, the normal, fair and orderly practice. E.g., *Covington v. Schwartz*, 230 F.Supp. 249 (N.D.Cal. 1964), aff'd *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965).

any objection to the absence of an administrative appeal.

Upon review by the State Director, he has plenary power to order the case appealed to the appeal board. 32 C.F.R. §§1626.1, 1655.20.[11] If the appeal board should decide in the registrant's favor, the case before the court would become moot; if the appeal board should decide adversely to the registrant, the prosecution would proceed.

This approach would have a number of advantages: (1) it would give Selective Service another opportunity to subject exemption claims to meaningful review; (2) it would avoid the due process problems involved in a forfeiture, without notice, of the right to defend; (3) it would leave the statutory structure of the law unchanged; (4) it would prevent the wholesale bypass of administrative appeals feared by the Solicitor General [Resp. Br. pp. 29-30]; (5) it might terminate a number of cases at the pre-trial stage, and thus reduce the burden on the courts; (6) it would involve deferment rather than abdication of jurisdiction.

There is one other advantage over the rule urged by the Solicitor General. His rule would tend to promote appeals in every case where an exemption or deferment claim is rejected by a local board. Since only about one-third of all registrants classified I-A are actually called for induction, two-thirds of the

[11]Alternatively, he is empowered to order a reopening by the local board, which would thereupon be required to cancel the induction order. 32 C.F.R. §1625.3(a).

appeals would be a waste of time, placing an unnecessary burden on the appeals boards.

CONCLUSION

To permit punishment without hearing would defeat a basic element of the liberty we seek to defend. Therefore, the decision of the court below must be reversed.

Dated, San Francisco, California,
January 25, 1971.

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Richard Kenneth LeGrande

(Appendices A and B Follow)

Appendix A

Falbo v. United States, 320 U.S. 549 (1944), came up under legislation [the Selective Service and Training Act of 1940] which contained no provision for judicial review of Selective Service orders. [320 U.S. at 554, 557.] Classified as a conscientious objector, Falbo was ordered by his local board to report for civilian alternative service. He refused to report, believing that he should have been classified as a minister, and was therefore exempt from all forms of national service. Criminal prosecution was brought, and the District Court, declining to hear the defense of misclassification, convicted him. The Court of Appeals affirmed. The Supreme Court granted certiorari and framed the question as follows:

> . . . whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

The Court answered this question in the negative, saying:

> The circumstances under which the Act was adopted lend no support to a view which would allow litigious *interruption of the process of selection* which Congress created. * * * Surely if Congress had intended to authorize interference with that process by *intermediate challenges of orders to report,* it would have said so. (320 U.S. at 554, emphasis added.)

The court observed that, under the procedure then used, the registrant was not tested for physical and

mental fitness until he reported for service, so that the process of selection was incomplete "until the registrant is accepted by the army, navy, or civilian public service camp." [320 U.S. at 553.] The Court also noted that "approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected . . ." [320 U.S. at 553, n. 7.]

Falbo holds simply that there can ordinarily be no judicial review of draft board orders until completion of the selection process. This interpretation is confirmed by *Estep v. United States,* 327 U.S. 114 (1946), where the Court held that judicial review was available to a registrant who had completed the selection process but had refused to be inducted.[1] Thus the essence of the *Falbo* decision is that the registrant must go to the brink of induction in order to obtain judicial review of the draft board order. Like the traditional concept of exhaustion of administrative remedies, the *Falbo* rule is aimed only at deferment of judicial review until the end of the administrative process.[2]

---

[1]Since both *Falbo* and *Estep* had taken administrative appeals, there was no occasion for the Court to decide whether failure to have done so would have precluded judicial review.

[2]The Solicitor General describes *Falbo* as establishing that a registrant's failure "to exhaust his administrative remedies . . . precludes a challenge to the validity of his assigned classification in defense to a criminal prosecution". [Resp.Br. pp. 11-12.] The essential ambiguity in that description lies in the meaning of the phrase "exhaustion of administrative remedies". If it means following the selection process to its conclusion (going to the brink of induction) we are in agreement with the Solicitor General's interpretation. If it means, additionally, the filing of an administrative appeal during the selection process, we are in disagreement with the Solicitor General's interpretation. *Falbo* did not so hold; the issue was not even before the Court.

Appendix B

Yakus v. United States, 321 U.S. 414 (1944) involved the E
Emergency Price Control Act of 1942. The Act, adopte
d as a temporary wartime measure, provided for p
rice controls to be promulgated by a Price Administra
tor appointed by the President. It further provided: (
a) that any price regulation could be protested with
in 60 days after its issuance by filing a protest with
h the Administrator; (b) that upon denial of a protes
st, the person aggrieved could file a complaint in th
he Emergency Court of Appeals within 30 days therea
after to enjoin or set aside the regulation; (c) that re
eview of an adverse decision by that court could be so
ught by petition to the Supreme Court for certiorari; (d) that the Emergency Court of Appeals and the Su
upreme Court "shall have exclusive jurisdiction to
determine the validity of any regulation or order" of t
the Price Administrator; (e) *that no other court shall
l have such jurisdiction;* (f) that violations of regulati
ions or orders of the Price Administrator would be I
prosecuted in the District Courts.

In the
District Court Yakus was convicted under the Act fo
or selling at prices above maximum prices prescribed
d by the Administrator. Without having protested the
e pertinent regulations issued by the Administrato
or within the period prescribed by the Act, Yakus of
ffered to prove in defense of the criminal prosecutio
on that the regulations were invalid. The District C
Court, rejecting that offer on jurisdictional grounds,
found him guilty and the Court of Appeals

affirmed. On certiorari this Court also affirmed, holding that the review and enforcement procedure prescribed by the Act did not offend due process principles.

> There is no constitutional requirement that that test [of the validity of an administrative regulation] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. [321 U.S. at 444.]

The following features, *inter alia,* distinguish *Yakus* from the case at bar:

1. The *Yakus* legislation was "a war-time emergency measure." [321 U.S. at 431-2.] The legislation here involved is not of that emergency character.

2. The *Yakus* legislation deprived the District Courts of jurisdiction to determine validity of the administrative order. The legislation here involved specifically confers jurisdiction on the District Courts to determine validity of the administrative order. [50 U.S.C. App. §460(b)(3).]

3. The *Yakus* legislation itself provided notice of the requirement of administrative protest and appeal. The legislation here involved, lacking any provision requiring a draft registrant to take an administrative appeal, provides no such notice.

4. The *Yakus* legislation affected businessmen, presumably sophisticated in legal matters and presumably assisted by legal counsel. The legislation here involved affects young men at age eighteen, unsophisti-

cated in legal matters and usually lacking access to legal counsel.

5. The *Yakus* legislation provided that the exclusive means of attacking validity of the administrative order was through protest filed with the Administrator and action in the Emergency Court of Appeals. The legislation here involved contains neither provision for exclusive review by administrative appeal, nor for judicial review of an administrative order by independent suit.

6. The *Yakus* legislation involved purely economic interests of persons affected. The legislation here involved affects personal liberty and to a substantial extent the right to life itself.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McGEE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 362. Argued February 23, 1971—Decided May 17, 1971

Petitioner applied in 1966 for conscientious objector status to his local Selective Service board, which advised him that his claim would be passed on when his student deferment expired. His board was told in 1967 that petitioner had been accepted for a graduate program where, in petitioner's own view, he would "probably qualify" for a theological exemption. However, no request for ministerial student status was made, nor was pertinent supporting information presented. Petitioner refused to fill out a current information questionnaire sent to him on his graduation from college, announcing that he would not cooperate with the Selective Service System. Following the local board's subsequent reclassification of petitioner I-A, he did not seek a personal appearance before the board or appeal board review. Petitioner thereafter refused to submit to induction, for which, along with other draft law violations, he was prosecuted and convicted. The Court of Appeals, rejecting petitioner's defense that the local board had erred in its classification, affirmed. *Held:* Petitioner's failure to exhaust his administrative remedies jeopardized the interest of the Selective Service System, as the administrative agency responsible for classifying registrants, in developing the facts and using its expertise to assess his claims to exempt status and thus bars petitioner's defense that he was erroneously classified. *McKart* v. *United States*, 395 U. S. 185, factually distinguished. Pp. 4–12.

426 F. 2d 691, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 362.—October Term, 1970

Vincent Francis McGee, Jr., Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 17, 1971]

Mr. Justice Marshall delivered the opinion of the Court.

Petitioner was convicted of failing to submit to induction and other violations of the draft laws. His principal defense involves the contention that he had been incorrectly classified by his local Selective Service board. The Court of Appeals ruled that this defense was barred because petitioner had failed to pursue and exhaust his administrative remedies. We granted certiorari, 400 U. S. 864 (1970), to consider the applicability of the "exhaustion of administrative remedies" doctrine in the circumstances of this case.

I

In February 1966, while attending the University of Rochester, petitioner applied to his local Selective Service board for conscientious objector status. In support of his claim to that exemption he submitted the special form for conscientious objectors (SSS Form 150), setting forth his views concerning participation in war.[1] The board

[1] In this connection he noted that he intended "to continue on to actual ordained Priesthood." After registering for the draft in 1961, petitioner had informed the local board that he was then a student at a Catholic seminary, preparing for the ministry under

continued petitioner's existing classification—student deferment—and advised him that the conscientious objector claim would be passed upon when student status no longer applied.

In April 1967 petitioner wrote to President Johnson, enclosing the charred remnants of his draft cards and declaring his conviction that he must "sever every link with violence and war." The letter included a statement that petitioner had "already been accepted for graduate study in a program where I would probably qualify for the theological deferment." A copy of the letter was forwarded to the local board; the board continued petitioner's student deferment. Petitioner graduated in June 1967, and thereafter the board sent him a current information questionnaire (SSS Form 127), which asked *inter alia* for specific information concerning his future educational plans and generally for any information he thought should be called to the board's attention. Petitioner returned the questionnaire unanswered and announced in a cover letter that henceforth he would adhere to a policy of noncooperation with the Selective Service System.

In September 1967 the board reviewed petitioner's file, rejected the pending conscientious objector claim,[2] and reclassified petitioner I-A. In response to his reclassification petitioner sought neither a personal appearance before the local board nor review by the appeal board. Indeed, pursuant to his policy of noncooperation he returned to the board, unopened, the communication notifying him of the reclassification and of his right to appear before the local board, to confer with the Govern-

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the direction of the Roman Catholic Church. Subsequently he left the seminary and later enrolled at the University of Rochester, a secular university.

[2] See n. 10, *infra*.

ment appeal agent, and to appeal. Petitioner did not appear for a physical examination ordered to take place in October 1967. He did respond to an order to appear for induction in January 1968, and he took a physical examination at that time. However, he refused to submit to induction.

Petitioner was prosecuted, under 50 U. S. C. App. § 462 (a) and applicable Selective Service regulations,[2] for failing to submit to induction (count I), failing to report for a pre-induction physical examination (count II), failing to keep possession of a valid classification notice (count III), and failing to submit requested information relevant to his draft status (count IV). Petitioner was convicted on all four counts and sentenced to two years' imprisonment on each count, the sentences to run concurrently. Petitioner's principal defense to liability for refusing induction[4] was that the local board had erred in classifying him I-A.[5] The Court of Appeals, with one judge dissenting, held that the defense of incorrect classification was barred because petitioner had failed to exhaust the administrative remedies available for correction of such an error. The conviction was affirmed by the Court of Appeals.

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[2] See 32 CFR § 1632.14; 32 CFR § 1628.16; 32 CFR § 1623.5; 32 CFR § 1641.7 (b).

[4] In the Court of Appeals, as here, petitioner argued that the defense of erroneous classification would if valid defeat criminal liability for acts charged under counts II and III, as well as count I.

[5] Petitioner contended, as he does in this Court, that the board erroneously failed to pass on the merits of his conscientious objector claim when reclassifying him in September 1967, that at any rate the board erred in denying conscientious objector status, and also that the board erred in failing to grant him a ministerial student exemption. Petitioner had matriculated at Union Theological Seminary in September 1967, after being reclassified I-A. He had never, however, requested that he be classified exempt from the draft as a ministerial student. See pp. 7–9, *infra*.

II

Two Terms ago, in *McKart* v. *United States*, 395 U. S. 185 (1969), the Court surveyed the place of the exhaustion doctrine in Selective Service cases, and the policies that underpin the doctrine. As it has evolved since *Falbo* v. *United States*, 320 U. S. 549 (1944), and *Estep* v. *United States*, 327 U. S. 114 (1946), the doctrine when properly invoked operates to restrict judicial scrutiny of administrative action having to do with the classification of a registrant, in the case of a registrant who has failed to pursue normal administrative remedies and thus has sidestepped a corrective process which might have cured or rendered moot the very defect later complained of in court. Cf. *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 235–236 n. 5 (1968); *Gibson* v. *United States*, 329 U. S. 338, 349–350 (1946). *McKart* stands for the proposition that the doctrine is not to be applied inflexibly in all situations, but that decision also plainly contemplates situations where a litigant's claims will lose vitality because the litigant has failed to contest his rights in an administrative forum. The result in a criminal context is no doubt a substantial detriment to the defendant whose claims are barred. Still this unhappy result may be justified in particular circumstances by considerations relating to the integrity of the Selective Service classification process and the limited role of the courts in deciding the proper classification of draft registrants.*

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*Certainly it is late in the day to launch a broadside against the whole scheme of the exhaustion doctrine in Selective Service cases, as petitioner attempts, on the ground that a doctrine of the same name operates in some other legal context simply to inhibit premature access to the courts on the part of a litigant seeking affirmatively to challenge agency action. Cf. *McKart* v. *United States*, 395 U. S. 185, 193–195 (1969). Nor is it tenable to say that the doctrine is inappropriate when fashioned by judicial decision

A

After *McKart* the task for the courts, in deciding the applicability of the exhaustion doctrine to the circumstances of a particular case, is to ask "whether allowing all similarly situated registrants to bypass [the administrative avenue in question] would seriously impair the Selective Service System's ability to perform its functions." 395 U. S., at 197. *McKart* specified the salient interests that may be jeopardized by a registrant's failure to pursue administrative remedies. Certain failures to exhaust may deny the administrative system important opportunities "to make a factual record" for purposes of classification, or "to exercise its discretion or apply its expertise" in the course of decision-making. *Id.*, at 194. There may be a danger that relaxation of exhaustion requirements, in certain circumstances, would induce "frequent and deliberate flouting of the administrative process," thereby undermining the scheme of decision-making that Congress has created. *Id.*, at 195. And of course, a strict exhaustion requirement tends to ensure that the agency have additional opportunities "to discover and correct its own errors," and thus may help to obviate all occasion for judicial review. *Ibid.*

To be weighed against the interests in exhaustion is the harsh impact of the doctrine when it is invoked to bar any judicial review of a registrant's claims. Surely an insubsantial procedural default by a registrant should not shield an invalid order from judicial correction, simply

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rather than specific congressional command. See *id.*, at 193–194, 197; *id*, at 206 (WHITE, J., concurring). The whole rationale of the exhaustion doctrine in the present context lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed. See generally *Mulloy* v. *United States*, 398 U. S. 410, 416 (1970); *Witmer* v. *United States*, 348 U. S. 375, 380–381 (1955).

because the interest in time-saving self-correction by the agency is involved. That single interest is conceivably slighted by any failure to exhaust, however innocuous the bypass in other respects, and *McKart* recognizes that the exhaustion requirement is not to be applied "blindly in every case." *Id.*, at 201. *McKart* also acknowledges that the fear of "frequent and deliberate flouting" can easily be overblown, since in the normal case a registrant would be "foolhardy" indeed to withhold a valid claim from administrative scrutiny. *Id.*, at 200. Thus the contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of a discrete analysis of the particular default in question, to see whether there is "a governmental interest compelling enough" to justify the forfeiting of judicial review. *Id.*, at 197.

In the McKart case, the focal interest for purposes of analysis was the interest in allowing the agency "to make a factual record, or to exercise its discretion or apply its expertise." There the registrant had failed to take an administrative appeal from the local board's denial of "sole surviving son" status. Later the issue of McKart's entitlement to that exempt status arose in a criminal context, and the Court held that the claim should be heard as a defense to liability despite the failure to exhaust. The validity of the claim was a question "solely . . . of statutory interpretation." *Id.*, at 197–198. McKart's failure to exhaust did not inhibit the making of an administrative record—all the relevant facts had been presented. *Id.*, at 198 n. 15. The issue was not one of fact and thus its resolution would not have been aided by the exercise of special administrative expertise; and proper interpretation of the statutory provision in question was not a matter for agency discretion.

In the present case the same interest is pivotal—but here it is apparent that McGee's failure to exhaust did jeopardize the interest in full administrative fact-gathering and utilization of agency expertise, rather than the contrary. Unlike the dispute about statutory interpretation involved in *McKart*, McGee's claims to exempt status—as a ministerial student or a conscientious objector—depended on the application of expertise by administrative bodies in resolving underlying issues of fact. Fact-finding for purposes of Selective Service classification is committed primarily to the administrative process, with very limited judicial review to ascertain whether there is a "basis in fact" for the administrative determination. See 50 U. S. C. App. § 460 (b)(3); *Estep* v. *United States*, 327 U. S. 114, 122–123 (1946); cf. *Witmer* v. *United States*, 348 U. S. 375, 380–381 (1955). *McKart* expressly noted that as to classification claims turning on the resolution of particularistic fact questions, "the Selective Service System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew." 395 U. S., at 198 n. 16. See *id.*, at 200–201. This "stronger interest," in the circumstances of the present case, has become compelling and fully sufficient to justify invocation of the exhaustion doctrine.

B

Petitioner argues that denial of exemption as a ministerial student was erroneous, but he had never requested that classification nor had he submitted information that would have been pertinent to such a claim. In regard to his entitlement to this exempt status, McGee made no effort to invoke administrative processes for fact-finding, classification, and review, It is true that vagrant bits of information may have come to the attention of the local

board raising a bare possibility that petitioner might qualify as a ministerial student,[7] but this hardly changes the picture of a thoroughgoing attempt to sidestep the administrative process and make the first serious case for an exemption later in court.

Such a default directly jeopardizes the functional autonomy of the administrative bodies on whom Congress has conferred the primary responsibility to decide questions of fact relating to the proper classification of Selective Service registrants.[8] See *McKart* v. *United States*,

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[7] Petitioner's letter to President Johnson, a copy of which was transmitted to the board, declared that petitioner's future graduate studies in his own view "would probably qualify" him for the ministerial student exemption. This is the sole communication from petitioner that actually reached the board, however circuitously, and contained a hint of petitioner's projected studies at the Union Theological Seminary, though the letter did not say where petitioner intended to study and it gave no information whatever on other matters critical to ministerial student status. See n. 9 *infra*. Petitioner's reliance on information communicated by him not to the local board but to certain FBI agents and to an assistant United States attorney is even more far-fetched.

[8] Local Board Memorandum No. 56 (August 18, 1954) prescribes that "[t]o substantiate the claim of a registrant that he is a theological student, the local board must require him to furnish" certain relevant evidence. Petitioner contends that this directive places the burden of fact-gathering on the board and relieves him of the responsibility to produce unsolicited evidence relevant to a ministerial student claim. However, in petitioner's case there was no "claim of a registrant" before the board, and at any rate the board's fact-gathering efforts were thwarted by petitioner's refusal to fill out the current information questionnaire (SSS Form 127) sent to him. Thus we need not consider the relevance of the directive for exhaustion purposes in the case of a registrant who claims ministerial student status but falls short in his initial proofs.

Petitioner's emphasis on the mandatory statutory language relating to exemption of ministerial students, 50 U. S. C. App. § 456 (g) (such persons "shall be exempt"), is also misplaced. This is not a case where, though no definite formal request for exemption is

395 U. S. 185, 198 n. 15 (1969); cf. 32 CFR § 1622.1 (c). Here the bypass was deliberate and without excuse, and this is not a case where entitlement to an exemption would be automatically made out given a minimal showing by the registrant or minimal investigatory effort by the local board.[8] The exhaustion requirement is properly imposed where, as here, the claim to exemption depends on careful factual analysis and where the registrant has completely sidestepped the administrative process designed to marshal relevant facts and resolve factual issues in the first instance. Cf. *Dickenson* v. *United States*, 346 U. S. 389, 395–396 (1953).

C

Petitioner did claim exemption as a conscientious objector to war. He filled out and returned the special form for conscientious objectors (SSS Form 150), and appended a further statement of beliefs, thereby making out a prima facie case for the exempt status. Since at that

made, entitlement to exemption is clear on information submitted. Indeed, even on the record as developed in the trial court below, much less on the scraps of information available to the Selective Service System, denial of exemption in petitioner's case is not unsupportable. See n. 9, *infra*.

[8] The Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (g), provides that "students preparing for the ministry under the direction of recognised churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognised theological or divinity schools, . . . shall be exempt . . . ." See 32 CFR § 1622.43 (a). Evidence aired at trial showed that after September 1967 petitioner was engaged in studies at Union Theological Seminary, a nondenominational seminary. There was some evidence that petitioner intended eventually to become a priest, but scant evidence, if any, tending to indicate that petitioner's studies were "under the direction" of his church. The Court of Appeals determined, in view of the trial record, that "denial of a [ministerial student] exemption to McGee would have had a 'basis in fact.'" 426 F. 2d 691, 696 (CA2 1970).

time—1966—petitioner held an undergraduate student deferment, the board postponed consideration of the claim to a "higher" classification. See 32 CFR § 1623.2. In 1967, after petitioner had graduated, the pending conscientious objector claim was reviewed [10] and rejected, and petitioner was classified I–A. Petitioner contends that denial of conscientious objector status was erroneous, but after the claim was rejected he did not invoke the administrative processes available to correct the error. He did not seek a personal appearance before the local board,[11] nor did he take an administrative appeal to contest the denial before the appeal board, which classifies *de novo*.[12]

That petitioner's failure to exhaust should cut off judicial review of his conscientious objector claim may seem too hard a result, assuming, as the Government admits, that the written information available to the board provided no basis in fact for denial of the exemption, and, as the Court of Appeals ruled, that neither did petitioner's conduct in relation to the conscription system or other acts that came into view. See 426 F. 2d 691, 697 (CA2 1970); *id.*, at 700–701 (dissenting opinion). But even assuming the above, petitioner's dual failure to exhaust—his failure either to secure a personal appearance or to take an administrative appeal—implicates decisively the policies served by the exhaustion requirement, especially the purpose of ensuring that the Selective Service System have full opportunity to "make a factual record" and "apply its expertise" in relation to

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[10] Though the trial testimony was somewhat ambiguous, the District Judge found specifically that the local board had passed on the merits of petitioner's pending conscientious objector claim in September 1967, before reclassifying petitioner I–A. We do not disturb this finding, which was approved by the Court of Appeals majority below.

[11] See 32 CFR §§ 1624.1, 1624.2.

[12] See 32 CFR §§ 1626.2, 1626.26.

a registrant's claims. When a claim to exemption depends ultimately on the careful gathering and analysis of relevant facts, the interest in full airing of the facts within the administrative system is prominent, and as the Court of Appeals noted, the exhaustion requirement "cannot properly be limited to those persons whose claims would fail in court anyway." *Id.*, at 699.

Conscientious objector claims turn on the resolution of factual questions relating to the nature of a registrant's beliefs concerning war, *Gillette* v. *United States*, — U. S. — (1971), the basis of the objection in conscience and religion, *Welsh* v. *United States*, 398 U. S. 333 (1970), and the registrant's sincerity. *Witmer* v. *United States*, 348 U. S. 375, 381 (1955). See 50 U. S. C. App. § 456 (j). Petitioner declined to contest the denial of his conscientious objector claim before the local board by securing a personal appearance, and the Selective Service System was thereby deprived of one opportunity to supplement the record of relevant facts. The opportunity would have been restored had petitioner sought review by the appeal board. While the local board apparently was satisfied that classification should be made on the basis of the record it confronted,[13] the appeal board, which classifies *de novo*, might have determined that the record should be supplemented by the local board.[14] See 32 CFR § 1626.23. In the circumstances of this case, petitioner's failure to take an administrative appeal not only deprived the appeal board of the opportunity to "apply its expertise" in factfinding to the record that was available; it also removed an opportunity to supplement a record containing petitioner's own submissions

[13] Petitioner's board did not summon him for an interview to inquire into the sincerity of his claim prior to classification, as it might have done. See Local Board Memorandum No. 41, as amended July 30, 1968 (rescinded August 27, 1970).

[14] Local boards have wide fact-gathering powers. See 32 CFR §§ 1621.14, 1621.15, and 1625.1 (c).

but not containing the results of any specific inquiry into sincerity.

The Government contends that unless the exhaustion requirement is imposed to bar judicial review when the failure to exhaust has the present character, registrants would be encouraged to sidestep the administrative processes once a prima facie claim to conscientious objector status is made out by submission of a carefully drafted Form 150. Should the claim be denied at the local board level, the claimant might be tempted to circumvent further fact-gathering processes, and take a chance on showing in court that the only administrative record available contains no basis in fact for denial of the claim. This somewhat extreme situation is indeed presented by the circumstances of the present case, though of course there is no reason to question the bona fides of McGee's own supervening policy of noncooperation with the conscription system. It remains that McGee's failure to pursue his administrative remedies was deliberate and without excuse. And it is not fanciful to think that "frequent and deliberate flouting of the administrative process" might occur if McGee and others similarly situated were allowed to press their claims in court despite a dual failure to exhaust.

III

We conclude that petitioner's failure to exhaust administrative remedies bars the defense of erroneous classification,[15] and therefore the judgment below is

Affirmed.

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[15] This defense figures in petitioner's challenge to his conviction on counts I, II, and III. The two-year sentences on each of the four counts are to run concurrently, and we decline to disturb the conviction on count IV, a minor offense indeed in comparison to the act involved in count I.

SUPREME COURT OF THE UNITED STATES

No. 362.—October Term, 1970

Vincent Francis McGee, Jr., Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 17, 1971]

Mr. Justice Douglas, dissenting.

This is a case where so far every judge has agreed that McGee is a conscientious objector. He expressed his belief "in a personal Supreme Being to whom obligation is superior when duties of human relations are considered"; he said that "taking part in any form of military operation indicates an approval/consent situation repugnant . . . to love and service of God and fellowman." The majority of the Court of Appeals concluded that "Neither his prior nor his subsequent actions were inconsistent with his assertions . . . and we see nothing in McGee's file—all that was before the board—that could reasonably put his sincerity in issue." 426 F. 2d 691, 697. Judge Feinberg in dissent agreed. *Id.*, at 703.

Petitioner was a Roman Catholic studying at the Union Theological Seminary in New York City, preparing for the ministry. His sincerity and dedication to his moral cause are not questioned.

The critical issue in the case is whether the Selective Service Board in 1966 did "consider" and reject the claim of the registrant that he was a conscientious objector. The District Court and a majority of the Court of Appeals held that the Board did pass on the claim. And this Court now refuses to pass on the registrant's claim to the contrary, because, it says, that finding is not

"clearly erroneous." That the finding is clearly erroneous seems apparent to one who reads the entire record.

The advice which the registrant received in a letter from the Board dated March 23, 1966, was as follows: "We wish to advise that your claim as conscientious objector will be considered when you no longer qualify for student classification." That letter states that decision on the "claim as conscientious objector" will be passed on later. The inference is clear—that it was not then considered and decided.

The Chairman of the Board testified that the conscientious objector claim was not considered, ". . . because the young man was attending college and in my judgment he rated a II–S qualification which we proceeded to give him." He later testified that in February 1966 he, the Chairman of the Board, felt "that there weren't sufficient facts in that to motivate me to grant the registrant the request he sought." Yet even that ambiguous statement is a far cry from concluding that the Board rejected his claims to status as a conscientious objector. Indeed, it was the duty of the Board under the Regulations to classify the registrant "in the lowest class for which he is determined to be eligible." 32 CFR § 1623.2. And it is clear that the student classification of II–S is lower than the classification of a conscientious objector, I–O. In 1966 the Board therefore had no occasion to pass on the conscientious objector claim.

As respects the reclassification of registrant in 1967 the Chairman of the Board testified: ". . . I recall that subsequently the young man finished his college or left college, I don't recall, and did not further merit a II–S deferment at which time, sir, based on nothing further in his file other than what we had already had in the file, we gave him a I–A classification. In doing that, sir, we again reviewed what appeared in the file." And the

Chairman also testified: "He was no longer in school and we had no alternative but to classify him I–A."

But it is clear from the Chairman's own testimony that the classification of I–A granted in 1967 was based upon the supposition that the Board had denied the conscientious objector claim in 1966, for the Chairman stated:

> "Based on our previous determination that his request for conscientious objection status was denied, we had no alternative at that time but to give him a I–A, which we did.
>
> "Q. You didn't consider the conscientious objector claim again because it had been denied previously?
>
> "A. Yes——"

And yet, as the Chairman also testified, the *Board made no decision in 1966:*

> "Mr. Lande [Board Chairman]: When Mr. McGee's return application came in asking his deferment on the grounds of conscientious objector, sir, that was reviewed by me and read and carefully considered, as I consider all requests. As I stated before, it was my considered judgment upon concluding the reading of it and my consideration that he did not rate the deferment.
>
> . . . . .
>
> "Q. Mr. Lande, am I correct in understanding that the decision with respect to this conscientious objector application was made, then, by you and *not by the entire board?*
>
> "The Court: Are you talking now about the original receipt of the application?
>
> "Mr. Meyer [counsel for petitioner]: Yes, your Honor.
>
> "The Court: Or when they were told or learned that he no longer was in college?
>
> "Mr. Meyer: The orginal receipt.

"The Court: He said, as I recall it, that that was his decision."

It is, with all due respect, I think, a clear miscarriage of justice to allow a man to be sent off to prison where there are at best only dubious grounds for saying that the Board discharged its statutory duty of considering and passing upon the conscientious objector claim.

The question might not loom as important as it seems to be in this case if the claim itself were a transparent one. But there is nothing on the face of the claim or in the record to detract from it. The man was a theological student studying for the priesthood, and to send him off to prison on this record is either to sanction a form of administrative trickery or to allow the Selective Service Board to act quite irresponsibly.

If there were a "lawless" act in this case, it was committed by the Selective Service Board.

It was the Board that defaulted, not McGee. Its duty under the Regulations was "to *receive and consider all information*, pertinent to the classification of a registrant, presented to it." 32 CFR § 1622.1 (c) (italics added). The Board did not "consider" the claim. Since the Board did not "consider" the claim and reject it, but deferred decision on it in 1966 and then in 1967 said that the 1966 deferment was a decision on the merits, there was no way in which McGee could have made a timely appeal to the board.

This case, on the facts, is a much stronger one for dispensing with the need to exhaust administrative remedies than was *McKart* v. *United States*, 395 U. S. 185. In *McKart* the registrant failed to appeal his classifications of I–A where he had enjoyed a IV–A classification (sole surviving son status) until his mother died. Then the Board put him in I–A on the ground that the "family unit' had ceased to exist. We excused exhaustion of

remedies on the ground that only a question of law was involved. We rationalized the result as follows:

> "In short, we simply do not think that the exhaustion doctrine contributes significantly to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction. Accordingly, in the present case, where there appears no significant interest to be served in having the System decide the issue before it reaches the courts, we do not believe that petitioner's failure to appeal his classification should foreclose all judicial review." *Id.*, at 200.

By like reasoning, we should conclude that cases where the local board does not "consider" the conscientious objector claim, must be few and far between. Moreover, the term "consider" is a key part of a Regulation and just as much a question of law as the phrase in issue in *McKart*. Men should not go to prison either because boards are derelict or vindictive.

I would reverse this judgment of conviction.